TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 664. 252

ALEXANDER FRANKENTHAL AND ALBERT FRANKENTHAL, PARTNERS UNDER THE FIRM OF A. FRANKENTHAL & BRO., PLAINTIFFS IN ERROR,

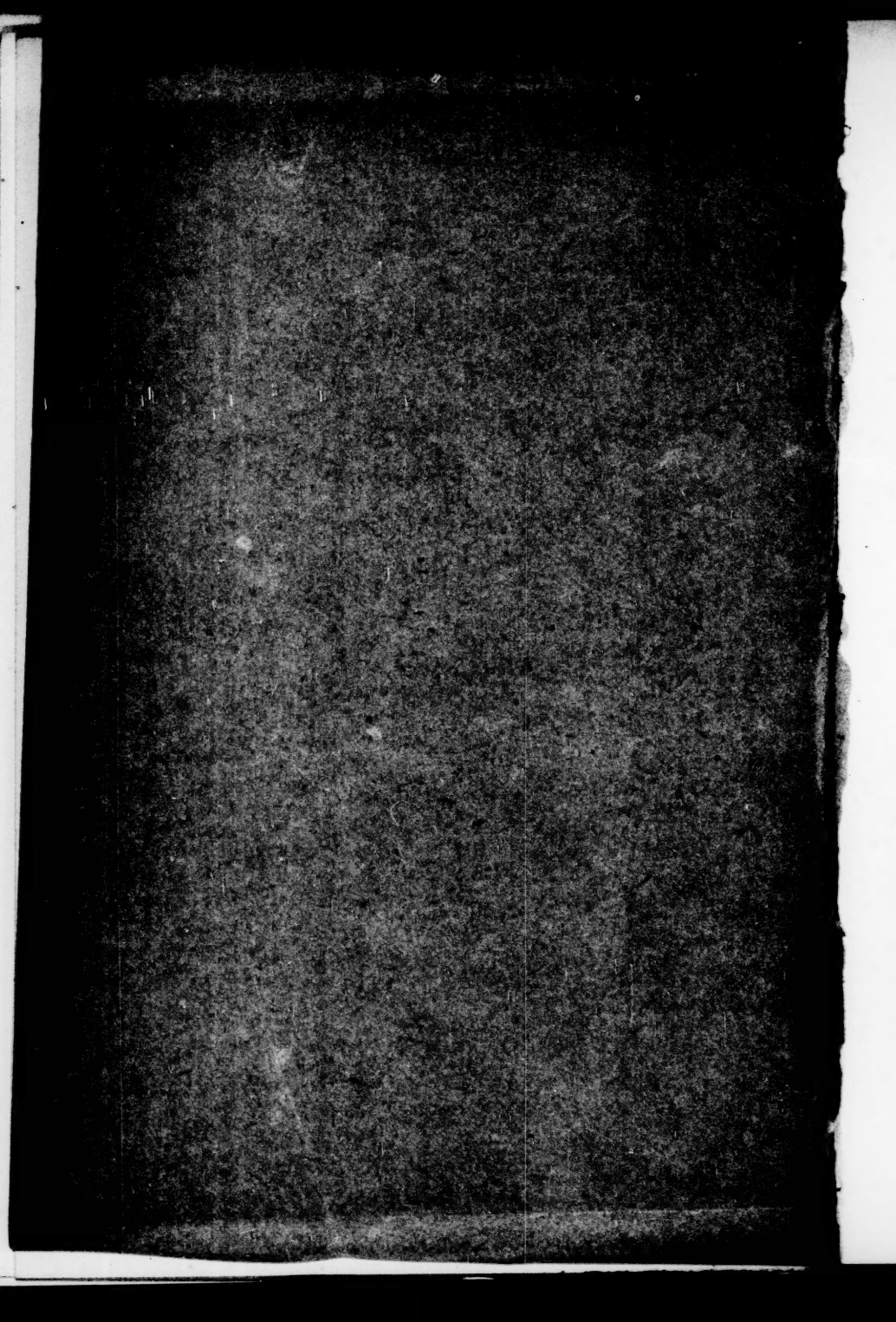
vs.

W. SCOTT COOK.

IN ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

FILED AUGUST 29, 1901.

(14,828.)



(14,828.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 607.

ALEXANDER FRANKENTHAL AND ALBERT FRANKENTHAL, PARTNERS UNDER THE FIRM OF A. FRANKENTHAL & BRO., PLAINTIFFS IN ERROR,

vs.

W. SCOTT COOK.

IN ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

INDEX.

	Original.	Print.
Caption	1	1
Bond for attachment	1	1
Complaint	2	1
Summons	4	3
Marshal's return	5	3
Order of attachment	5	3
Marshal's return	6	4
Notice of application for receiver	7	4
Marshal's return	7	5
Affidavit of defendant traversing ground of attachment	8	5
Order calling jury and beginning trial	9	6
Order continuing trial	10	6
Order concluding trial	10	6
Verdict	11	7
Motion for new trial	11	7
Order overruling motion for new trial	14	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1893.

that defendant was indebted to plaintiffs upon the — day of ——, 1889, upon open account (a copy of which is herewith filed and made a part hereof) in the sum of six hundred and seventy-seven dollars for goods, wares, and merchandise sold and delivered by plaintiffs to defendant at his own special instance and request; that $483.50 of said debt is past due, and, although demand has been made, no part thereof has been paid except as is credited therein; that one hundred and ninety-three $\frac{50}{100}$ dollars is to become due on the — day of December, 1889. Plaintiffs further say that defendant has sold, conveyed, or otherwise disposed of his property or suffered or permitted it to be sold with the fraudulent in-
3 tent to cheat or defraud his creditors or to hinder or delay them in the collection of their debts; that he is about to make fraudulent sale, conveyance, or disposition of his property with such intent; that he is about to remove or has removed his property or a material part thereof out of the Indian Territory, not leaving enough therein to satisfy plaintiffs' claim or the claim of said defendant's creditors.

Wherefore plaintiff- prays judgment against W. Scott Cooke, defendant herein, for the sum of $483 & interest thereon now due and on $193.50 when the same shall become due and for costs and other relief.

SANDELS, WARNER & HUTCHINGS,
Att'ys for Plaintiff-.

W. T. Hutchings says that he is attorney for the plaintiffs, who are non-residents of the Indian Territory, and that affiant believes that the statements of the foregoing complaint are true, and that the claim in this action against the defendant is for money due and to become due upon open account for goods, wares, and merchandise sold and delivered to the defendant as set forth in the foregoing complaint, which he believes to be true; that it is a just claim, and that he believes that the plaintiffs ought to recover thereon the sum of $677 and interest.

W. T. HUTCHINGS.

Subscribed and sworn to before me this 12th day of December, 1889.

WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*.

It is hereby ordered that the attachment herein issue against the defendant for the sum of $677, $483.50 — is past due and $193.50 of which *is* become — on the — day of December, 1889, and for the sum of $30 cost-.

[SEAL.] WM. NELSON, *Clerk*.

Endorsed: "No. 604. A. Frankenthal & Bro. *vs.* W. Scott
4 Cooke. Complaint. Filed Dec. 12, 1889. Wm. Nelson, clerk. Sandels, Warner & Hutchings, att'ys."

Afterwards, to wit, on the same day, there was issued a writ of summons and order of attachment; which said writ of summons is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, }
Indian Territory. }

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to summons W. Scott Cooke to answer on the first day of the next April term of the United States court for the Indian Territory, being the 7th day of April, A. D. 1890, a complaint filed against him in said court by A. Frankenthal & Bro., and warn him that upon his failure to answer the complaint will be taken for confessed; and you will make due return of the summons on the first day of the next April term of said court.

Witness the Honorable James M. Shackelford, judge of
[SEAL.] said court, and the seal thereof, at Muscogee, Indian Territory, this 12th day of December, A. D. 1889.

W. NELSON, *Clerk.*"

Endorsed: "No. 604. A. Frankenthal & Bro. *vs.* W. Scott Cooke. Summons. Summons issued Dec. 12, 1889; returnable April term, 1890. Service, 2.00; miles, 292, 17.52; expense, 101.50. Sandels, Warner & Hutchings, attorneys for plaintiff. Filed Jan. 31, 1890. Wm. Nelson, clerk."

5 The following is the return of the marshal on the summons:

"Received the summons at 3.10 o'clock p. m., Dec. 12, 1889, and I certify to having served said summons by leaving a copy thereof with the within-named defendant, W. Scott Cook, at Fred, this 16th day of Dec., 1889, by leaving a copy thereof at Fred, the usual place of abode of within-named defendant, W. Scott Cook, with W. Scott Cook himself.

THOMAS B. NEEDLES, *Marshal,*
By JOHN SAULSBURY, *Deputy.*"

And said order of attachment is in words and figures as follows, to wit:

"In the United States Court for the Indian Territory.

ALEXANDER FRANKENTHAL & ALBERT FRANKENTHAL, Partners under the Firm of A. Frankenthal & Brother, Plaintiffs,
vs.
W. SCOTT COOKE, Defendant.

6 *Order of Attachment.*

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to attach and safely keep the property of the defendant, W. Scott Cooke, in your district not exempt from

execution, or so much thereof as will satisfy the claim of A. Frankenthal & Bro., the plaintiffs in this action, for six hundred and seventy-seven dollars, and thirty dollars for the costs thereof, and to summon — and such other persons as the plaintiff- may suggest as garnishees to answer this action on the first day of the next April term, 1890, of the United States court for the Indian Territory, at Muscogee, Indian Territory, and you will make return of this order on that day.

Witness the Honorable James M. Shackelford, judge of
[SEAL.] said court, and the seal thereof, at Muscogee, Indian Territory, this 12th day of December, A. D. 1889.

W. NELSON, *Clerk.*"

Endorsed: "No. 604. Order of attachment. Writ issued Dec. 12, 1889; returnable April term, 1890. Marshal's fees: Service, 2.00; miles, 292, at 6 cts. per mile, 17.53. Received this order 3.10 p. m., Dec. 12, 1889. T. B. Needles, U. S. marshal. Sandels, Warner & Hutchings, attorneys for plaintiff-."

Return.

Received this order of attachment 3.10 p. m., Dec. 12, 1889, and I certify to having left with W. Scott Cook a copy of the same this 16th December, 1889. I have also made a levy upon the following-described property of the within-named defendant, to wit, the storehouse and stock of goods therein, per inventory attached, consisting of hardware, groceries, boots and shoes, hats and caps, clothing, gents' furnishing goods, drugs, &c.

T. B. NEEDLES, *Marshal,*
By JOHN SAULSBURY, *Deputy.*

7 Afterwards, to wit, on the 13th day of January, A. D. 1890, there was filed in the office of the clerk of the United States court in the Indian Territory a notice of application for receiver; which said notice, with endorsements, is in words and figures as follows, to wit:

"To W. Scott Cooke, Fred, Indian Territory.

SIR: You will take notice that five days after the service hereof we shall apply to the judge of the Federal court at Muscogee, Tuesday, 24th day of December, 1889, for the appointment of a receiver to take charge of the goods, wares, and merchandise seized by the marshal of the Indian Territory on December 16th, 1889, at the suit of plaintiffs in the causes pending in the United States court for the Indian Territory, sitting at Moscogee, wherein A. Frankenthal & Bro. and Lewin Bros. & Co. are plaintiffs and W. Scott Cooke is defendant.

A. FRANKENTHAL & BRO.,
By SANDELS, WARNER & HUTCHINGS, *Att'ys.*"

Endorsed: "Received the within notice on the 20th day of December, '89, at 6 p. m., and executed the same by leaving a copy

thereof with W. Scott Cooke on the 20th day of Dec., '89, at 6.15 p. m., at Fred, I. T. T. B. Needles, marshal, by John Salisbury, deputy. No. 604. A. Frankenthal & Bro. *vs.* W. Scott Cooke. Notice of application for receiver. Filed Jan. 13, 1890. Wm. Nelson, clerk."

8 THE UNITED STATES OF AMERICA, } ss:
United States Court, Indian Territory, First Judicial Division. }

At a stated term of the United States court in the Indian Territory, first judicial division, begun and had in the court-rooms at Muscogee, in the Indian Territory, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Present. The Hon. James M. Shackelford, judge of said court.

On Wednesday, the ninth day of April, 1890, among the proceedings had were the following, to wit:

Affidavit Controverting the Grounds of Attachment.

A. FRANKENTHAL & BRO. }
vs. } 604.
W. SCOTT COOKE. }

On this day comes the defendant and files affidavit controverting the grounds of attachment herein; which affidavit is in words and figures as follows, to wit:

"*Affidavit of Defendant Traversing Grounds of Attachment.*

In the U. S. Court for the Indian T'y., April Term, A. D. 1890.

A. FRANKENTHAL & BRO. }
vs. } 604.
W. SCOTT COOKE. }

W. Scott Cook, defendant in above cause, upon his oath denies that he has ever sold, conveyed, or otherwise disposed of his property, or that he has ever suffered or permitted the same to be sold, with the fraudulent intent to cheat or defraud his creditors
9 or to hinder or delay them in the collection of their just debts. He denies that he is or ever was about to make a fraudulent sale, conveyance, or disposition of his property with such fraudulent intent, and defendant denies that he is or was about to remove or has removed his property or a material part thereof out of the Indian Territory, not leaving enough therein to satisfy the plaintiffs' claim or the claim of said defendant's creditors; all as charged in plaintiffs' affidavit for attachment.

W. SCOTT COOK.

Subscribed and sworn to before me this 22d day of March, A. D. 1890.

[SEAL] WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*."

Endorsed: "604. A. Frankenthal & Bro. *vs.* W. Scott Cook. Filed Apr. 9, 1890. Wm. Nelson, clerk. Blair & Lester, for def't."

Afterwards, to wit, on the 4th day of June, A. D. 1890, the following further proceedings were had and entered of record:

A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOK. } 604.

On this day come the parties and announce ready for trial on the issue joined as to the grounds of attachment herein, and thereupon come the following jury, to wit, Barry Hogan, Doc Denny, J. H. Smith, A. M. Lawson, Simpson Burnett, J. L. Thomas, W. W. Haynes, H. C. Lowery, J. W. Bumgarner, Joseph Douglass, C. F. Hacker, and S. A. Adams, twelve good and lawful men, competent and qualified to try this cause, over the age of twenty-one years, *bona fide* residents of the Indian Territory, and having sufficient understanding of the English language to comprehend the
10 proceedings of the court, who were then and there empaneled and sworn to try this cause, and who, having heard a portion of the evidence and there not being time to hear the remainder, are permitted to separate under the charge of the court until to-morrow morning at nine o'clock.

Afterwards, to wit, on the 5th day of June, A. D. 1890, the following further proceedings were had and entered of record:

A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOKE. } 604. Trial Continued.

On this day come the parties, by their respective attorneys, and the jury heretofore empaneled and sworn to try this cause also came, and after hearing the evidence — under the charge of a sworn bailiff awaiting the discussions of questions of law before the court.

Afterwards, to wit, on the 6th day of June, A. D. 1891, the following further proceedings were had and entered of record:

A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOK. } 604. Trial Continued.

On this day come the parties, by their attorneys, and the jury heretofore empaneled and sworn to try said cause also came, and after responding to their names and hearing the balance of the evidence, argument of counsel, and the instructions of the court, retire, under the charge of a sworn bailiff, to make up their verdict.

A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOK. } 604. Verdict.

The jury having agreed upon a verdict, they are returned into open court by their bailiff, and the parties being present, by their
11 respective attorneys, and the jury, having responded to their names, return into open court the following verdict:

"A. FRANKENTHAL & Co.
vs.
W. SCOTT COOK. } 604. Verdict.

We, the jury, find the issues in favor of defendant, and assess his damages at $—, with interest, $5,854.63.
Attorneys' fees, $150.00.

W. W. HAYNES, *Foreman.*"

Afterwards, to wit, on the 7th day of June, A. D. 1891, the same being the — judicial day of said term of said court, the following further proceedings were had and entered of record:

A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOK. } 604. Motion for a New Trial.

On this day come the plaintiffs, by their attorneys, and file their motion for a new trial herein.
Said motion is in words and figures as follows, to wit:

In the United States Court for the Indian Territory.

A. FRANKENTHAL & BRO., Plaintiff,
vs.
W. SCOTT COOK, Defendant.

Comes the plaintiff and moves the court for a new trial herein and for cause says:
I. The court erred in excluding the testimony of W. T. Hutchings relative to the admissions or statements of David T. Cook regarding the execution of a bill of sale by W. Scott Cook to Baer, Seasongood & Co. and Orr & Lindsley Shoe Co.
II. The court erred in refusing instructions numbered I, II, II (alternative), III, IV, and V, asked by plaintiff.
12 III. The court erred in instructing the jury as follows:
"The court instructs the jury that fraud is never presumed, but must be proved, and before the plaintiffs can sustain their attachment upon the grounds first alleged in their affidavit they must prove by a fair preponderance of the evidence that the defendant had, prior to the date on which the attachment issued, sold, conveyed, or otherwise disposed of his property or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder, or delay his creditors."

IV. The court erred in giving to the jury the following instruction: "Upon the second ground of attachment the court instructs the jury that if they shall believe from the evidence that the defendant Cook was insolvent or in failing circumstances, and that he removed a material part of his property—that is, the cattle he shipped to Kansas City—out of the Indian Territory, not leaving enough therein to satisfy the claims of his creditors, you should sustain the attachment. Unless you shall also believe from the evidence that the defendant Cook removed and shipped said cattle into the market at Kansas City, there to be sold and the proceeds of such sale to be applied to the payment of the debts of *bona fide* creditors in good faith and without fraudulent intent, and if you shall also believe from the evidence that said cattle were so sold in Kansas City, and that the proceeds of such sale were applied by the defendant to the payment of his debts to *bona fide* creditors in good faith and without fraudulent intent, then you will not sustain the attachment on this ground, even if the defendant was insolvent or in failing circumstances."

V. The court erred in giving to the jury the following instruction: "If the jury should find from the evidence that the defendant sold a part of the stock of goods to Baer, Seasongood & Co.
13 and Orr & Lindsley Shoe Company, and that there was not such a change of the possession as required by law, but that the facts are such as to raise a presumption of fraud, then the question arises and the sole question for you to pass upon and settle is whether or not the presumption of fraud is repelled by the evidence. The question being, is the sale honest and *bona fide* and not designed as a mere trick to cover the property? was the possession retained, if retained at all, for a fair and honest purpose? The intention of the parties and the circumstances attending the transaction are to be duly considered by you in deciding the question of fraud or no fraud. You should consider all the facts and circumstances, if there be such, disclosed by the evidence which to the common understanding and conscience of men either prove on their face or tend to prove good faith. You will carefully consider all the evidence adduced before you and determine for yourselves the question involved. Was there a sale? Was there a valid consideration? Was their a concealment or notoriety attending the transaction? What relation did the parties sustain to each other? What are the facts, if any, indicating a fair intent on the part of the vendor and vendee? The reasonableness as to value and quality of the property claimed to have been sold, together with all other facts connected with the transaction, and from all the facts and circumstances connected with the case you will decide of the intent of the defendant. Was his intent to hinder, delay, or defraud his creditors?"

VI. The court erred in giving to the jury the following instruction: "The court further instructs the jury that if you find for the defendant, the measure of his damages will be the fair cash market value of the goods and property at the time of the loss by fire, with

six per cent. interest from that date, to which you will add
14 what under the evidence you believe to be a reasonable attorney's fee."

VII. The jury's verdict was erroneous in being contrary to the evidence and the law.

VIII. The verdict of the jury was not supported by sufficient evidence.

IX. The verdict of the jury was excessive, showing passion and prejudice on the part of the jury.

X. The court erred in admitting the statement of Salisbury, deputy marshal, made to Mr. Blair, touching instructions given by attorney for plaintiff.

XI. The court erred in refusing to submit to the jury the interrogatories for special findings, as requested to do by plaintiff.

SANDELS, WARNER & HUTCHINGS,
S. S. FEARS, LEDBETTER & HERBERT,
For Plaintiffs.

Endorsed: "604. A. Frankenthal & Bro. *vs.* W. Scott Cook. Motion for new trial. Filed June 6, 1890. Wm. Nelson, clerk."

Afterwards, to wit, on the 11th day of August, A. D. 1890, the same being the — judicial day of said term of said court, the following further proceedings were had and entered of record:

A. Frankenthal & Bro.
vs.
W. Scott Cook. } 604. Motion for a New Trial Overruled.

Now, on this day, this cause coming on to be heard on the motion for a new trial heretofore filed herein, the court, having heard the argument of counsel and being fully advised in the premises, doth overrule the same.

Afterwards, to wit, on the same judicial day of said term
15 of said court, the same being the 11th day of August, 1890, plaintiffs, by their attorney, filed the following, to wit:

"Frankenthal & Bro.
vs.
W. Scott Cook.

The verdict of the jury in this cause is subject to a credit of seven hundred and five $\frac{92}{100}$ dollars, the amount of the debt sued on in this case and not denied by the defendant and for which the plaintiffs *has* judgment."

Whereupon the court entered the following judgment:

"On motion of defendant, by his attorneys, Blair & Lester, for judgment on the verdict in this cause, it is ordered and adjudged that the defendant, W. Scott Cook, have and recover of the plaintiffs, A. Frankenthal & Bro., the sum of five thousand one hundred and forty-eight $\frac{71}{100}$ dollars and one hundred and fifty dollars attorneys' fee, together with his costs in this behalf expended."

Afterwards, to wit, on the same judicial day of said term
16 of said court, the same being the 11th day of August, A. D. 1890, the following further proceedings were had and entered of record:

A. FRANKENTHAL & BRO.
vs. } 604.
W. SCOTT COOK.

Now, on this day, come the plaintiffs herein, by the attorneys, and by leave of the court tender their bill of exceptions herein and pray that the same be signed, sealed, filed, and made a part of the record in this cause, which is now accordingly done.

Said bill of exceptions is in words and figures as follows, to wit:

"A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOK.

Be it remembered that on this 5th day of June, 1890, being a day of the regular April term, 1890, of the United States court for the Indian Territory, before the Hon. James M. Shackelford, this cause came on to be heard, wherein A. Frankenthal & Brother were plaintiffs and W. Scott Cook was defendant.

And the plaintiffs, to sustain the issues upon their part, introduced W. T. HUTCHINGS, who, being duly sworn, says: I am an attorney-at-law and reside at Muscogee, I. T. I received instructions from St. Louis to the effect that W. Scott Cook, of Fred, I. T., had failed and to attach; also instructions to go to Fred, I. T., and collect or secure claim. I arrived at Fred Sunday afternoon following; found the store open and goods being sold in the due course of trade. David Cook, the brother of W. Scott Cook, was in sole charge of the store. I saw him sell some canned and other goods during the afternoon for cash.

17 Question. "Did you have any conversation with Dave Cook that evening?"

Answer. "Yes."

Question. "Did you ask him whether Scott Cook had assigned, sold, or mortgaged all or any portion of his stock of goods?"

To which question defendant objected. Counsel for plaintiff stated that the validity of the sale from Scott Cook to Baer, Seasongood & Co. and Orr-Lindsley Shoe Co., made on Nov. 30th, was one of the material issues in the trial, and the notoriety or secrecy of such sale was an essential question to be considered by the jury, and it was proposed to show by the witness that Dave Cook, the agent of the vendees and the person in possession of stock of goods, denied that there had been any sale or transfer. The court sustained the objection of the defendant and the plaintiff at the same time excepted and prayed *his* appeals.

He stated that Scott Cook was in Kansas City, where he had gone the week before, carrying some 190 head of cattle for sale. Scott

Cook returned from Kansas City that evening and I was introduced to him, but said nothing about business. The next morning I saw him in the office or bed-room adjoining his store; told him I was a lawyer and represented A. Frankenthal & Bro. and other creditors. He said he had no way of paying or securing the debts I represented or the debt of Lewin Bros., represented by myself and Mr. J. H. Wright, their traveling salesman. Upon my request he
18 made an exhibit of his assets and liabilities, giving some $10,649 of debts, all of which was due except about $200. He said his stock was worth some $5,000 and that he had about $1,000 of collectible accounts. I told him he knew it was reported by commercial agencies that he had assigned and that by his own statement he was insolvent and we must protect ourselves. He said that was true and that he did not blame us. He further said that he had given Baer, Seasongood & Co. and Orr-Lindsley Shoe Co. a bill of sale of the stock of goods, not specifying any particular part of them, for about $2,000. I *I* requested the inspection of it, but it could not be found, though he said a copy was kept. I went into the store and he never pointed out any part as belonging to them. The goods were arranged as in other stores, and there was nothing to indicate that any of them were the property of any person other than Scott Cook. He never mentioned a word about any goods of Rindskopp, Stern, Loner & Co., of Cincinnati, and I saw no goods boxed up anywhere. He said he would have nothing to do with the attachments and would leave that to his creditors. He subsequently asked me to write him an assignment, prefer-ing certain creditors, which I did.

Which was all the evidence introduced by the plaintiffs.

And the defendant, to sustain the issue on his part, being duly sworn, testified in his own behalf as follows:

My name is W. Scott Cook; residence, Fred, I. T. In November, 1889, I was doing a general merchandise business at Fred, I. T., a post office 45 miles west of Purcell, I. T. The nearest store to me was a little over 15 miles. My store and residence was the only houses at Fred. I owed Baer, Seasongood & Co. a debt, and during the latter part of November John Martin, representing this firm,
came to my place to collect his debt. I told him that the
19 class of my trade had changed considerably and many of the goods I had were unsaleable; that if I could get him and Orr-Lindsley Shoe Co. to take goods at invoice price I thought I could pay off all of my other debts when I sold my cattle. He said he would have to consult his house. He went away and came back in a week or ten days and agreed to my proposal. He drew up a bill of sale, which I signed. Dave Cook signed a paper, agreeing to hold the goods as his agent. We then invoiced the goods as set out in the invoice attached to the bill of sale. We put the goods out on the counter as we invoiced them, and then after dusting and cleaning them we put them in the shelves—that is, the clothing and gents' furnishing goods; the shelves were put on a double-decked table that I had in the center of the store made for holding shoes.

Martin then went away, leaving my brother, Dave Cook, in possession. I was busy on the outside, feeding and tending my cattle, and was about the store very little after that. I was occasionally in the store. Before Martin left I asked him if he thought I could get Rindskopf, Stern, Laner & Co. back their goods, as they were too high-priced to suit my trade. Martin advised me to pack up the goods I had bought from them and notify them that the goods would be shipped to them; that they might demur and kick a little, but that they would accept the goods. I had the goods packed up, and a few days later I notified them of the fact.

Witness here identifies the bill of sale, agreement, and invoice, which are as folows:

Bill of Sale.

"Know all men by these presents that I, W. Scott Cook, of Fred, Chichasaw nation, Indian Territory, for and in consideration of the sum of eighteen hundred and sixty-eight and $\frac{24}{100}$ ($1,868.24) dollars to me in hand paid, the receipt whereof is hereby acknowledged, do sell, assign, transfer, and set over to the firm of Baer, Seasongood & Co. and the Orr & Lindsley Shoe Co., a corporation, both of the city of Saint Louis, Missouri, the property specified in the invoice of this date and hereunto appended, consisting of boots and shoes, furnishing goods, and clothing as set out and itemized in said invoice.

To have and to hold unto the said Baer, Seasongood & Co. and the Orr & Lindsley Shoe Co. and their assigns forever.

I have this day delivered possession of all of the above-described property to the grantees herein.

In witness whereof I have hereunto set my hand and seal this thirtieth day of November, eighteen hundred and eighty-nine.

(Signed) W. SCOTT COOK. [SEAL.]

Executed in the presence of—
DAVID F. COOK &
JNO. C. MARTIN."

Agreement.

This agreement made on November 30th 1889.

Witnesseth: That whereas I have been appointe*n* agent of the firm of Baer, Seasongood & Co. and the Orr & Lindsley Shoe Co. of St Louis, Missouri, to receive and hold the stock of goods described in the inventory of this date, hereunto appended, heretofore owned by W. Scott Cook of Fred, Indian Territory, and which has been by him transferred to the above-named parties, and whereas I have taken possession of all of said property, as such agent, now therefore, I do hereby covenant and agree to hold, manage and account for all of said property at such times and in such manner as said parties may direct, and herewith submit the invoice of said property to the parties aforesaid.

Witness my hand and seal this thirtieth day of November, eighteen hundred and eighty-nine.

(Signed) DAVID F. COOK. [SEAL.]

21 *Invoice of Stock of Merchandise of W. Scott Cook, Fred, I. T.*

NOVEMBER 30TH, 1889.

7	p'rs hand-made store boots, 4	28 00
14	" " " " " 4.25	59 50
7	" " " " " 4	28 00
12	" " " " " 3.75	45 00
4	" " " " " 3	12 00
6	" " " " sewed, 4.50	27 00
1	" " " " " "	4 50
4	" pegged, 3.50	14 00
9	" men's but. shoes, 3.25	29 25
6	" men's slippers, 1.25	7 50
9	" men's Newport shoes, 1.40	12 60
2	" men's hand-made shoes, 1.90	3 80
5	" " " " boots, 3.75	18 75
3	" " " peg'd boots, 2.75	8 25
11	" youths' " " 2.00	22 00
1	dozen men's ar-tics	12 00
11	p'rs men's heavy boots, 2.00	22 00
7	" " " " 2.00	14 00
8	" " " " 1.65	13 20
6	" " " " 2.50	15 00
16	" boys' shoes, 1.10	17 60
9	" " boots, .90	8 10
9	" " " 1.25	11 25
3	" youths' boots, 1.90	5 70
	8 p'rs boys' boots, 1.00	8 00
22	7 p'rs boys' boots, 1.25	8 75
	3 " " fine boots, 2.00	6 00
3	p'rs boys' fine boots, 1.40	4 20
	Forward	$465 95
8	p'r- shoes, 1.40	11 20
12	" misses' shoes, 1.00	12 00
4	" ladies' calf shoes, 1.35	5 40
6	" ladies' " but. shoes, 1.00	6 00
8	" kid shoes (ladies'), 1.25	10 00
2	" ladies' kid shoes, 2.00	4 00
1	" " calf shoes,	1 50
4	" " but. shoes, 1.25	5 00
6	" " kid shoes, 2.65	15 90
5	" " " " 2.00	10 00
4	" " but. shoes, 1.50	6 00
5	" " " " 1.50	7 50
1	" misses' shoes	1 50
5	" ladies' kid but. shoes, 2.25	11 25

1 misses' shoes		1 25
5 p'r- ladies' but. shoes, 1.50		7 50
12 " old ladies' kid shoes, 1.25		15 00
10 " ladies' Fr. lace shoes, 1.00		10 00
12 " " " " " 1.00		12 00
8 " ladies' heavy calf shoes, 1.35		10 80
6 " children's shoes, .60		3 60
7 " " " .50		3 50
12 " " all calf shoes, .90		10 80
16 " ladies' slipper-, 1.00		16 00
8 " " " .90		7 20
12 " " " 1.25		15 00
3 " " " 1.00		3 00
2 " ladies' shoes, 2.25		4 50
7 " " " 1.25		8 75
2 " " fine shoes, 1.50		3 00
Forward		705 10
Amount forward		705 10
6 p'rs misses' beaded slipper-, 1.25		7 50
5 " ladies' " " .90		4 50
3 " ladies' kid but. shoes, 1.60		4 80
4 " children'- shoes (but.), 1 25		5 00
12 " " shoes, .60		7 20
20 " misses' buff shoes, 1.00		20 00
8 " school shoes, 1.10		8 80
8 " " " 1.30		10 40
3 " ladies' buff shoes, 1.00		3 00
12 " misses' but. shoes, .90		10 80
9 " children-' shoes, .50		4 50
5 " ladies' lace shoes, 1.00		5 00
10 " children's kid but. shoes, 1.00		10 00
12 " " " slippers, .75		9 00
8 " misses' c'f lace shoes, 1.10		8 80
6 p'rs ladies' Fr. but. shoes, 1.25		7 50
23 4 p'rs ladies' Fr. lace shoes, 1.10		4 40
5 " ladies' buff shoes, 1.25		6 25
6 p'rs ladies' kid but. " 2.25		13 50
8 " " " " " 1.65		13 20
10 " " lace shoes, 1.50		15 00
6 " ladies' kid but. shoes, 2.75		16 50
4 " " " " 2.25		9 00
4 " " of. lace shoes, 1.25		5 00
10 " " " buff shoes, 1.00		10 00
3 " " kid but., 2.25		6 75
2 " " Fr. kid, 3.00		6 00
8 " " buff lace, 1.00		8 00
Forward		$945 50

Amount forward	945 50
10 p'rs Fr. shoes, .90	9 00
15 " infant kid shoes, .60	9 00
7 " ladies' Fr. lace shoes, 1.00	7 00
4 " school, 1.25	5 00
4 " " .75	3 00
20 " Fr., .90	18 00
30 " misses' polkas shoes, .90	27 00
74 children's shoes, .60	44 40
Total shoe stock	$1,067 90
C. 375, 4 overshirts, 2.00	8 00
496, 10 " 1.50	15 00
603, 2 " 2.25	4 50
C. B. 100, 11 overshirts, .75	8 25
7290, 12 " 2.25	27 00
5, 12 (Climax) overshirts, 1.00	12 00
C. 899, 2 overshirts, 2.10	4 20
225, 7 " 2.00	14 00
275, 2 " 2 00	4 00
351, 9 " 2.00	18 00
280, 4 " 2.25	9 00
14, 6 " 1.40	8 40
334, 7 " 1.00	7 00
C. 92, 4 " 1.95	7 80
C. 759, 12 " .65	7 80
575, 8 stockinette coats, 3.50	10 50
2 cardigan jackets, 1.20	2 40
242, 7 overshirts, 2.00	14 00
Forward	$1,249 75
Amount forward	$1,249 75
215, 5 overshirts, 2.00	10 00
163, 15 cot. " .65	9 75
4 percale " .65	2 60
4 " " 1.25	5 00
6 " " .75	5 25
4 " " .75	3 00
8 white overshirts, .75	6 00
24 10 percale " 1.00	10 00
11 percale overshirts, .75	8 25
11 percale overshirts, 1.00	11 00
7 boys' percale overshirts, .50	3 50
9 " " " 1.00	9 00
2 " " " .65	1 30
8 " " " 1.00	8 00
7 " " " 1.00	7 00
4 linen " 1.20	4 80
12 " .63	7 56
3 boys' percale " .85	2 55

18	men's	overshirts, .21		3 78
10	"	" .45		4 50
9	"	" .45		4 05
4	"	" .27		1 08
11	"	" .50		5 50
4	men's	dr's, .50		2 00
4	"	" .60		2 40
2	"	undershirts, .40		80
		Forward		$1,394 42
		Amount forward		$1,394 42
10	men's	white dr's, .75		7 50
20	"	red merino S. & dr's, .55		11 00
7	"	dr's, .65		4 55
22	"	canton flannel dr's, .50		11 00
3	"	medicated fl. shirts, 1.75		5 25
7	"	*fnacy* wool " 1.25		8 75
4	"	undershirts, .50		2 00
4	"	" .90		3 60
10	ladies'	" & dr's, .50		5 00
5	"	" " 1.25		6 25
12	men's	dr's, .65		7 80
15	"	fine u'shirts and dr's, 1.90		28 50
2	"	" " " " 1.00		2 00
8223	2	case suits, 11.00		22 00
2197	2	" " 16.00		32 00
2198	3	" " 16.00		48 00
3854	1	" "		14 00
6625	1	" "		14 00
6556	1	" "		12 00
3904	1	" "		12 00
6605	1	" "		7 00
6339	1	" "		10 00
6545	1	" "		9 00
1174	1	" "		7 00
4783	1	" "		10 00
N. 4001	"	"		14 00
No. lot	1	case suits, heavy, unlined		18 00
		Forward		$1,724 62
		Amount forward		$1,724 62
25	4788	1 case suit		10 00
	1102	" " "		4 00
5713	1	case suit		10 00
2237	1	" " coat		7 50
6879	1	" "		6 50
1208	1	boy's cass. suit		3 50
9259	1	" " pants		3 75
84	12	jeans pants, 1.10		13 20
75	21	" " .90		18 90

5577	2	pants	(cass.), 5.00		10 00
8997	1	cass.	pants		2 35
900	5	"	"	2.00	10 00
955	6	"	"	4.50	27 00
935	3	"	"	4.25	12 75
950	3	"	"	4.50	13 50
9259	2	"	"	3.75	7 50
905	4	"	"	3.00	12 00
6556	1	"	"		5 00
9589	2	"	"	1.50	3 00
6611	1	"	"		1 75
3632	1	"	"		2 25
1108	1	"	"		2 25
					$1,911 32
			Discount on clothing		43 08
					$1,868 24

There may be errors in extensions, addition, and —, which you can correct.

The above is the invoice of goods sold and delivered to me this day for Mess. Baer, Seasongood & Co. & Orr & Lindsley Shoe Co., of Saint Louis, by W. Scott Cook, of Fred, I. T.

Respectfully, (Signed) JNO. C. MARTIN."

Witness here identified letters written by him of date Dec. 4 & Dec. 17 to R., S., L. & Co. and their answer, of date Dec. 20, 1889, which said letters are as follows, to wit:

"Office of W. Scott Cook, Indian trader and dealer in general merchandise. Ranch and trail supplies a specialty. Agent Stage Express Company.

FRED, INDIAN TER., *Dec.* 4, 189–.

Rindskopf, Stern, Lauer & Co., Cincinnati, Ohio.

26 GENTLEMEN: I have $600.00 worth of your clothing here. It does not suit my trade and you will have to take it back. It is boxed up and held subject to your order.

Respt., W. SCOTT COOK."

"Office of W. Scott Cook, Indian trader and dealer in general merchandise; ranch and trail supplies a specialty. Agent Stage Express Company.

FRED, INDIAN TER., *Dec.* 17, 18–9.

Rindskopf, Lauer & Co., Cincinnati, Ohio.

GENTLEMEN: My stock of goods was attached by U. S. marshal. As I wrote you, $600.00 worth of your goods are packed in box, awaiting your orders. They are returned goods, awaiting your orders. Write me immediately.

Resp't., W. SCOTT COOK."

"Rindskopf, Stern, Lauer & Co., wholesale clothiers, 126 Vine street.

CINCINNATI, *December 20th*, 1889.

Mr. W. Scott Cook, Fred, I. T.

DEAR SIR: Please return to us at once the clothing placed at our disposal by you, as per your letter of Dec. 4th.

Yours, respectfully,

RINDSKOPF, STERN, LAUER & CO.,
Dic. C. S."

At the date of the execution of the bill of sale I owned my dwelling-house and my storehouse, which was worth $400.00; a stock of goods which, at invoice price, amounted to 6,139.00, as shown by the marshal's return. I had 45 steer cattle of my own and 143 head of steer cattle which we call fed-out cattle—that is, they were cattle that I had purchased for $25.00 per head and which I was to feed and ship to market. All *of* over $25 which they netted was mine. These cattle would average 1,000 pounds in weight and were worth on the railroad from 4 to 4½ cts. p'r pound. I had book accounts that were collectible worth $2,500.00 and some corn and live stock, worth from $500.00 to a 1,000.00, besides my dwelling and furniture; also stable and fencing, worth $500. The fed-out cattle I had bought from one Grant. When I was ready to ship the cattle I notified him to meet me at Purcell. I then gave him a check for the purchase price (being 3,725.00) on Quimley & Montgomery, of Kansas City, to whom I shipped the cattle. I went with the cattle to Kansas City. I struck a very dead market, the lowest I ever saw. The cattle sold for 1½ to 3 cts. per pound. I did not draw any money on the cattle for even my travelling expenses and returned home on my R. R. passes. After returning from Kansas City I received two letters from Quimley & Montgomery, which are as follows, to wit:

27

"Office of Quinlan, Montgomery & Co., live-stock commission merchants.

KANSAS CITY, *Dec. 20th*, 1889.

W. Scott Cook, Esq., Fred, I. T.

DEAR SIR: We have mailed you a- p'r sales 188 cattle net proceeds $5,637.66.

We paid your note and int.....		$539 66
" " " c'k.....		3,727 50
" " Barton Bros.....		98 65
" " Sam'l C. Davis.....		730 53
		$5,096 34

$5,096 34

$541 32

This am't, $541.32, garnisheed our hands. The Smith, Heddens & Co. claim, without cost, is $248.10, and W. B. Grimes & Co. (without costs) is 228.22, and $65 held as contingent against probable

costs. Mess. Lingo & Co., of Denison, Tex., through their att'ys here, represent that they have claim on 142 cattle. This we know nothing about. Now, do you think it would be better to pay these two claims, $248.10 & $228.22. without incurring further costs or not? Please find inclosed your note, $539.66, paid.

Yours, respectfully,

QUINLAN, MONTGOMERY & CO.
M."

28 "Office of Quinlan, Montgomery & Co., live-stock commission merchants.

KANSAS CITY, *Jan'y* 21*st*, 1890.

W. Scott Cook, Esq., Fred, I. T.

DEAR SIR: Your favor of 14th inst. before us, and in reply would say that since writing you we have been informed that Sam'l C. Davis & Co., of St. Louis, are going to try to establish their claim against money of yours garnisheed in our hands, and under these circumstances we would not be warranted in paying out any money only from the order of the court.

Yours, very truly,

QUINLAN, MONTGOMERY & CO.
M."

(In liquidations.)

The note referred to in their letter was a note of $500.00 I owed them. The check was the check I gave Grant before leaving Purcell. When I returned home it was Sunday evening. I arrived home about dark. Mr. Wright, whom I knew well, was at our house. He and Mr. Hutchings were in one of the rooms reading. After supper I talked a while with Wright. I do not remember whether I was introduced to Hutchings that night or not. I may have been. Next morning Wright came to the store & we had a long talk. He told me my Saint Louis friends had gone back on me or ruined me and the best thing I could do was to make an assignment. After awhile Mr. Hutchings came in and he and Wright questioned me all about my business. I answered them, and as I did not think it was much of their business I may not have answered them correctly. I owed eight or nine thousand dollars and considered myself solvent. They told me they was going to attach me and did so, serving the papers on me in the store. I knew nothing about law and did not know what to do. My brother told me that Mr. Hutchings was a lawyer. Just as Mr. Hutchings was leaving Fred I went to him and asked him if I could make an assignment of my assets. He said I could. I asked him what it would cost and where I would have to go to make it. I told him I was as ignorant of law as a hog is of ancient history, but I wanted to do the best thing I could for my creditors. He said I had
29 treated him courteously and he would charge me nothing, provided I would prefer some claims he held. He then went to the house and drew the assignment. Some of the preferences he

suggested & some Wright suggested and some I suggested. In addition to those named in the deed I suggested Dezman McGinnis Saddelery Co. Hutchings said, You have enough here now, and I said al- right. After that Mr. Hutchings and Wright left. Saulsbury, the deputy marshal, took the invoice. I helped very little. My clerk, Mr. Cardell, helped some and another man whom Saulsbury brought there helped some. The post office was in the store and I was postmaster. I was in the store every day. During January Saulsbury wanted to go to Texas and wanted to leave my brother in charge. Dave Cook wanted to go to Oklahoma on business. Saulsbury persuaded me to go in Dave's place and got Dave to stay and take charge of the store. While Dave was in possession the store burned. My books and all the post-office outfit burned. Only one old ledger was saved. I told Mr. Saulsbury that certain of the goods had been sold to Baer, Seasongood & Co. & Orr-Lindsley Shoe Co. and pointed out to him the goods packed for Baer, Seasongood & Co. Mr. Blair, my attorney, was present at one time and remonstrated with him as to the excessive levy he was making. He said he was instructed by Mr. Hutchings to levy on everything.

(To the admission of this declaration of the marshals the plaintiffs at the time objected; which objection was by the court overruled; to which the plaintiffs at the time excepted and prayed *his* appeal.)

I shipped the cattle to Kansas City for the purpose of getting money to pay my debts. I proposed to apply all the money to my debts and did so apply every dollar of proceeds. The attachment of Lingo, Wapples & Co. was served on me after I had signed the assignment some two weeks.

Cross-examination:

30 At the time I shipped my cattle I owed the following parties the following sums, approximately:

Degnon McGinnis, 240.00; Smith, Hedding & Co., 240.00; Grimes & Co., 240.00; Wood M'f'g Co., 250.00; Wichita Cracker Co., 100.00; Tyler & Simpson, 250.00; Quinlan & Montgomery, 539.00; home debts, 400.00; Barton Bros., 98; Noyes, Mormon & Co., 369; Lingo, Wapples & Co., Waples, Platter & Co., 3,000.00; Rindskopfs & Co., 600; Baer, Seasongood & Co., Orr- Lindsley Shoe Co., 1,850.00; Corinth & Byrnes, 182.00; Waterman, Star & Co., 900; Scheff, Summer & Co., 250; Lewin Bros., 873; B. Frankenthal & Bro., 672; Englehan, Winning & Co., 476; Hayden Saddlery Co., 106; Collins Bros., 90; Sam. C. Davis & Co., 1,140—$12,965.00. With the exception of check or draft given Grant and note I owed Quinlan, Montgomery & Co. these cattle were not shipped to pay any particular debts. I proposed to pay all my debts. After I shipped my cattle I had left in the Territory my storehouse and merchandise, my home, about 2,500.00 collectible accounts, and some corn and live stock, worth from 500.00 to 1,000.00. In Kansas City I did not tell Mr. Smith that I had sold some of my goods to Martin. I told Mr. Black, who represents them, so. At the time I closed the deal with

Martin I did not notify my creditors, and don't remember telling anybody about it except Mr. Black. Dave Cook had clerked for me previous to the execution of the bill of sale to Martin for several months, as had also Cardell. These two stayed in the store after the execution of the bill of sale There was no disposition of the stock mentioned in the bill of sale except it was placed back in the shelves separate from other goods. It was understood that the goods were to be sold in the usual course of trade for cash. Dave Cook and Cardell ran the store while I was out tending the cattle. I don't remember that I sold any of these particular goods. I would have sold any if anybody had the cash to buy. It was so
31 understood by us all. There was nothing in the arrangement of the merchandise to indicate to any one that part of the stock belonged to one man and part to another. I was about the store about as much as usual, and there was nothing about the store to *to* indicate to any one that I had sold my part of the goods. I have not paid Baer, Seasongood & Co. or Orr, Lindsley & Co. any money since the attachment and still owe them the same amount I owed them when I shipped my cattle. I had given Mr. Platter, of Waples, Platter & Co., a mortgage on my cattle for his debt. He called it a mortgage, maybe. I called it merely a pledge to pay him the proceeds of the cattle over and above what I owed Grant. I did not pay Mr. Platter or any of his firm any of the money for cattle. I have never paid him any since. When I went to Kansas City I gave orders to ship the R., S. L. goods by the first wagon that was passing. It was not done, though, and they were still in the store, in the side room, I think, when I returned. These goods were packed in a box by themselves, marked R., S. L. & Co., with their address, Cincinnati, Ohio. I have been in business at Fred continuously for the past eight years. My stock of goods still had about 1,000.00 worth of clothing after taking out all the clothing turned over to Martin and that boxed for R. S. L. & Co., and I still had about four or five hundred dollars' worth of shoes. All of the clothing turned over to Martin was not purchased from him. The gents' furnishing goods turned over to Martin were not purchased from either B., S. & Co. or O. S. S. Co. It was purchased from other firms. The amount of gents' furnishing goods included in the bill of sale amounts to a little over 400.00. One of the reasons I made the deal with Martin was that my trade had changed. There had been a good cowboy trade, but the trade changed; cattle went out and farmers came in and a different class of goods was in demand.

32 All of my debts except part of the debt to Frankenthal & Bro., and possibly the debt due Collins Bros., was past due. Much of it was long past due. Lewin Bros., one of the attaching creditors, had sued me in April, 1889. Martin in November had come to collect his debt and wanted money. Many of the claims were pressing. I had no money at all and had no means of getting any then except from sale of my cattle and collections of debts due me. Martin, Cardell, Dave Cook, and I helped take the invoice for bill of sale. We occupied something less than a day in the work. Dave Cook was acting as custodian for the marshal when the store

was burned. The goods turned over to B., S. & Co. & O. L. S. Co. were entirely separated from other goods and Dave Cook had charge of them. It was agreed between him and John Martin that all sales were to be strictly cash and all money so received was to be paid to John Martin or his principals. There was no insurance on the store or goods. My insurance had run out and I had neglected to renew it.

And on behalf of defendant the depositions of David F. Cook, duly and regularly taken, was read in evidence and is as follows, to wit:

DAVID F. COOK, Fred, Chickasaw nation:

Q. What business relation, if any, did you sustain with your brother, Scott Cook?

A. None.

Q. I will ask you to state what you know about the attachment proceedings or the levy of the attachment in the above cases. State all the facts.

A. I forget the date It was about Dec. 16th. The man came over with the marshal and run the attachment.

Q. State if to your own knowledge Scott Cook had made any disposition of his stock of goods or any part thereof about that time and what disposition.

A. Well, he turned over to John Martin; sold him.

Q. What did he turn over?

33 A. He turned over clothing bought from his own house & boots and shoes.

Q. I ask you if you can identify these paper.

A. Yes, sir.

Witness here shown agreement of witness hereto attached and marked Exhibit "A."

Q. I will ask you if this is the signature of Scott Cook. You are familiar with his handwriting?

Witness shown bill of sale of Scott Cook to Baer, Seasongood & Co. and Orr-Lindsley Shoe Co., attachment marked Exhibit "B;" also invoice of merchandise attachment, marked Exhibit "C." Witness identifies signature to Exhibit-"A" and "B;" also identifies inventory.

Q. From whom were these goods described in the invoice purchased by Scott Cook?

A. Baer, Seasongood & Orr & Lindsley.

Q. What was the consideration for which Scott Cook transferred these goods to Baer, Seasongood & Co. and Orr & Lindsley?

A. It was to square up with them the old account he owed them.

Q. What was done with these goods after Scott Cook executed the bill of sale?

A. They were invoiced and left in my charge for me to sell and

keep the money separate and account to Baer, Seasongood, and Orr & Lindsley.

Q. After you took charge of these goods who, if anybody, had absolute control of the same?

A. I did, only.

Q. Do you know anything about the lot of goods bought of Rindskopf, Stern, Lauer & Co.?

A. Yes, sir; they were there in the house and they were goods that had been saleable, but not at that time, and John Martin recommended that if they were sent back it would be the best way to pay that debt, as the goods were not saleable at that time.

Q. What was done with the goods?

A. They were invoiced and figured up to see whether they would pay the debt or not. I think it ran some $6 over the debt.

Q. How were they disposed of?

A. They were put in a box, packed up, and marked Rindskopf, Stern, Lauer & Co.

Q. State of your own personal knowledge whether or not Scott Cook removed or attempted to remove any part of his property outside the territory for his personal benefit.

A. He did not, sir.

Q. How much of the stock was attached in the above-named cases?

A. Everything in the house, everything in or about the store.

Q. What became of the attached property?

A. It burned up.

Q. When the property was burned up in whose charge was it?

A. Well, I suppose it was in my charge. I think the marshal wrote Saulsbury to turn it over to me.

Q. After the attachment were any goods sold?

A. There was some medicine; I have an account of it; men would come along and want a dime's worth of tobacco and I sold it just the same as if the marshal was there.

Q. How much did these sales amount to?

A. To about the amount of $15.

Q. Who took charge of the money taken in that way?

A. I took charge of it.

Q. What did you do with it?

A. Turned it over to the marshal, a portion of it; I do not know how much.

These three exhibits are dated Nov. 30th, 1889.

Q. I ask you whether or not this is the correct date?

A. Yes, sir; it is correct.

Q. As to all matters to which you have testified in this direct examination I ask you whether you speak from your own personal knowledge or not.

A. I speak from my personal knowledge.

Q. By whom were the goods mentioned in this invoice,
34 Exhibit "C," taken possession of, if by anybody?

A. By Marshal Saulsbury. He took possession of them

open boxes, invoiced them, and moved them back; they had been laying there nearly a month,

Q. Was the marshal notified to whom the property last mentioned and the property described in Exhibit "C" belonged?

A. He was shown the invoice and told exactly how it was the boxes were marked. I told him the amount that was in it.

Q. Did Scott Cook make and secret of this bill of sale and *the* as to whom they belonged?

A. I do not know that it was any secret; everybody in the country knew it.

Cross-examination:

Q. Did not Scott Cook a week previous to the levy of the attachment herein ship to Kansas City one hundred and ninety head of cattle or thereabout?

A. Yes; he shipped a bunch of cattle to Kansas City.

Q. How many of these cattle were marked in his individual brand?

A. I cannot tell exactly how many. I know that he never got a dollar out of them.

Q. Do you know whether or not said cattle were attached in Kansas City?

A. I think they were. I do not know for certain.

Q. Do you know to whom these cattle were assigned when they were shipped to Kansas City?

A. I suppose to Quinlan & Montgomery. Those are the men he had been doing business with.

Q. Do you know whether any parties in Texas or the Indian Territory had mortgages on these cattle?

A. Not that I know of.

—. Did Lingo, Waples & Co. have a mortgage on them for $2,500.00?

—. I do not know.

Q. Were any of these cattle in the individual brand of Scott Cook?

A. No, sir; not a great many of them. I was down amongst them twice and he made two shipments, and how many he shipped the first and last time I cannot tell you.

Q. Were you ever interested in these cattle?

A. I was at one time.

Q. How did you part with your interest?

A. I did not wish to go into cattle-feeding business, and I traded my interest in steers for Scott Cook's interest in cows.

Q. Who had been attending to the business of Scott Cook previous to the levying of the attachment? The store I mean.

A. He had been tending to the business himself. I sold most of the goods when I was able. I had been sick a good deal, troubled with neur-algia. Outside the selling of the goods I knew nothing of the business.

Q. Had not a sore hand prevented your doing outside work for

a considerable time, and had you not tended almost exclusively to the store and the sale of the goods therein?

A. I tended to the sale of the goods, but nothing else.

Q. How long had that been?

A. I cannot tell you; for four weeks my hand was in a sling.

Q. Was it previous to the bill of sale given herein mentioned?

A. Yes, sir.

Q. How many bills of sale did you give the Orr-Lindsley Shoe Co.?

A. One bill of sale to Orr, Lindsly & Co. and another, I suppose, to Baer, Seasongood & Co.

Q. Did not Mr. John C. Martin take a bill of sale, go away from there, and return some time afterward, and say that was wrong and asked for another in accordance with the form he brought with him?

A. I do not know. I do not think he got another.

35 Q. Did you not so state to me in the storeroom of Scott Cook and in the office thereof?

A. I do not recollect whether I did or not.

Q. Was more than one inventory taken to make this bill of sale?

A. No, sir; only one.

Q. Was that inventory restricted exclusively to the articles named in the bills of sale?

A. It was.

Here shown part of inventory marked Exhibit "D."

Q. Did you not state to me that this was part of the inventory taken by Mr. John C. Martin for the purpose of making a bill of sale?

A. I do not know whether that is part of it or not. That is not Mr. Martin's handwriting.

Q. Do you know that handwriting?

A. It is the handwriting of W. S. Cordell.

Q. Did Mr. Cordell assist in making the inventory for the bill of sale?

A. I do not think he did. He aimed to take an inventory of the goods, and set in to do it, and Mr. Martin—John C. Martin—in going over the boots, and shoes, and clothing, he says, That is enough or more than enough to pay the whole thing.

Q. Was it known for what purpose this inventory was being taken?

A. I do not know whether it was or not. He didn't stop to tell anybody.

Q. Did not you state to Mr. Wright and myself on Sunday, December 15, in your bedroom connected with the store, that you were taking this inventory because the insurance compnaies demanded it, and that Mr. John C. Martin merely assisted for accommodation merely?

A. I recollect you asked me if there had be-n any—if my brother had made an assignment and I told you he had not. I do not recollect exactly what I said, whether I said that, or what I said. I

know you stayed there and bothered me considerably. I was sick and in bed.

Q. Did you not, in answer to question of Mr. Wright's, state that no bill of sale had ever been given on the stock of goods?

A. No, sir; I did not.

Q. Did you not state to Dr. Judkins on the same evening and about the same place that John C. Martin was merely assisting in taking the inventory for the purpose of insurance, and that when John Martin was there $500.00 had been paid on the indebtedness of the house he represented?

A. No, sir; I made no statement to Dr. Judkins at all. I expect I was asked that question a hundred times during that business. What answer I gave I cannot tell.

Q. Was there anything in the store or any change made in the goods to indicate that they had been sold to anybody or that they were owned by anybody other than Scott Cook?

A. The clothing was separated. I do not know if anybody could have told the difference.

Q. Did you ever tell anybody that property was the property of Orr-Lindsley Shoe Co. and Baer, Seasongood & Co., and that in selling the same you are acting as their agent?

A. I do not know that I ever did, sir. It was not my business to explain to every one that come in who the goods belonged to.

Q. Did you have anything to do with or were you acquainted with the books of Scott Cook?

A. No, sir; I was not. I had nothing to do with them.

Q. What amount of the goods included in the bill of sale were sold by you?

A. Well, sir, it amounted to $40 or $50, or something of that kind.

Q. Did Scott Cook have anything to do with the business or any part of it after this bill of sale was given?

A. Yes, sir; he had.

36 Q. Were any goods in the store sold on a credit after the bill of sale?

A. Not a dollar's worth, sir.

Q. Were you not frequently questioned as to whether or not Scott Cook had made an assignment or whether any change had been made in the business; if so, what was your answer?

A. I had several ask me if he had made the assignment, and I told them no, the same as I told you.

Q. Can you say now, after reflecting, Mr. Cook, whether or not you signed the bill of sale here shown you the first time John C. Martin was at Fred for the purpose of taking the bill of sale or the second time he came over with reference to the same?

A. I do not know whether it was the first time or the last time. It was only about a day's difference, I think.

Q. Do you know whether or not Mr. Martin receipted to your brother in full for the indebtedness he represented against him?

A. No, sir; I do not.

Redirect:

Q. What day did Mr. Hutchings come to Fred?
A. He came over on Sunday. I do not know what date it was.
Q. In what capacity did he appear to you?
A. He did not say. I did not know who he was.
Q. When did you first find out who he was?
A. Just about the time he was getting ready to leave.
Q. When was that?
A. That was Monday; I think about noon on Monday.
Q. Did he tell you what his business was?
A. No, sir.
Q. I will get you to examine the invoice marked "Exhibit B" and ask you whether or not the goods there listed were intended to be conveyed to John Martin to secure his debt.
A. No, sir; they were not.
Q. I ask you for what purpose that invoice was made.
A. They set in to see what amount there was in stock.
Q. Why?
A. Well, to see if there was enough to cover his indebtedness. I suppose that is what it was for. Outside the selling I know nothing of the business.
Q. What become of the money realized on the sale of any part of these goods or on whatever there was sold? Who took charge of it and what became of it?
A. I took it in my own possession.
Q. For whom?
A. To turn over and remit the Baer, Seasongood & Co.
Q. What became of the money?
A. I lost it in my vest pocket. I had it pinned up in my inside vest pocket during the fire, and when the explosion occurred I was knocked down and lost my vest with the money.

Recross-examination:

Q. Did you know Mr. Wright, who accompanied me, whom he represented, and what his business was?
A. Did I know him? He told me that he was up at Alex and just run up to see us, to see how we were getting along.
Q. Did you know that Scott Cook was largely indebted to the firm he represented and had been sued by said firm on such indebtedness?
A. Yes; I knew he had been sued, but I did not know what the amount was.

(Signed) DAVID F. COOK.

JNO. MARTIN, being duly sworn, testified as follows:

I had been selling goods to Mr. Cook for several years. During
1889 he fell behind us, and in November I went to his place
37 to collect our debt, which was long past due. He told me he
had no money. He offered to turn me over goods enough to
cover my claim at cost price. He said if he could settle with us in

this way he thought when he sold his cattle he could pay off all of his debts and have something left. I told him I would have to go to the railroad and write or wire my house. I wrote my house and enclosed form of bill of sale, which I wrote out. I told them the situation. In a few days I got their letter of instructions, which inclosed a form of a bill of sale and an agreement to be signed by the *preson* in possession. I made a copy of these. Scott Cook signed the bill of sale and Dave Cook signed the agreement to hold the goods as agent. We invoiced goods enough to cover my debt. We took the clothing — had sold and the boots and shoes sold by Orr-Lindsley Shoe Co. These did not invoice enough, and we took some other clothing and some gents' furnishing goods. The goods as invoiced were put out on the counter. Then we dusted and cleaned them and put them back in the shelves. I left Dave Cook in possession, went to the railroad, and sent the bill of sale, &c., to my house with a full report of all that I had done for their approval. I have entered a credit on my little pocket memorandum book to Scott Cook for $1,868.24.

Cross-examination:

I received no instructions from my house as to the disposition of the goods after the bill of sale was executed. Scott Cook has paid me nothing since, and Dave Cook has paid me nothing. I don't know whether anything has been paid to my house or not. When the goods were back in the shelves it was understood that Dave Cook should remain in possession and should sell them for cash. Scott Cook and Cordell could sell them also. Both Dave Cook and Cordell had previously clerked for Scott Cook. There was
38 no change in the store. Any person coming in the store could have seen nothing to call his attention to the fact that part of the goods were Scott Cook's and part mine. No sign was put out and nothing about the store was changed in the least. Cook told me that the goods were unsuited to his trade. He could not pay my debt, and I thought I would accommodate him. I do not settle with solvent men in this manner. I frequently take back goods from good customers when they do not suit.

Question. Why, if these goods were unsuited to that market, did you leave them there to be sold on the same market?

Answer. I made the trade and reported to the house and left it for them to give further directions.

Redirect:

I have known Scott Cook a long while, and know his reputation for honesty and business integrity is good.

PAT. BYRNES, being duly sworn, testified on behalf of defendant:

I have known Scott Cook for several years, and know his reputation for honesty and business integrity. It is good.

Which was all the evidence introduced in this cause.

Whereupon plaintiff- requested the court to instruct the jury as follows:

"I. The court instructs you that if you believe from the evidence that defendant shipped or removed a material portion of his property from the Indian Territory, not leaving enough property within the Indian Territory to satisfy all of his indebtedness, you will find for the plaintiff- and sustain the attachment, and it is not necessary for you to find that defendant shipped said cattle without fraudulent intent or to cheat, hinder, or delay his creditors."

Which instruction was by the court refused; to which the plaintiff- at the time excepted, and prayed their appeal.

39 "II. The court instructs you that the instrument read in evidence purporting to be a bill of sale by defendant to Baer, Seasongood & Co. and Orr & Lindsley Shoe Co. is a mortgage or security, and if you find from the evidence by the terms of the instrument or by consent or agreement of parties said goods covered by the mortgage were allowed to remain in stock as before the execution of the instrument mixed with other goods of defendant, with the defendant or his clerk in possession and control of all the stock, selling at retail for cash or credit in the usual course of trade, this renders such transaction fraudulent and void as to creditors, and you will sustain the attachment."

Which instruction was by the court refused; to which plaintiff- at the time excepted and prayed *his* appeal.

II (alternate). The court instructs you that under the evidence in this cause there was no sufficient delivery of the goods purporting to have been sold by defendant to Baer, Seasongood & Co. and Orr & Lindsley Shoe Co., and that the sale from defendant to said Baer, Seasongood & Co. and Orr & Lindsley Shoe Co. never became complete, and such attempted sale was a fraud upon defendant's creditors, and you will sustain the attachment in this cause."

Which instruction was by the court refused; to which plaintiff- at the time excepted and prayed *his* appeal.

III. The court instructs you that in arriving at your verdict you will take into consideration all the acts, declarations, and conduct of the defendant, and if from all these you find that defendant had at the date of the issuance of the attachment sold, conveyed, or otherwise disposed of his property with a fraudulent intent to cheat, hinder, or delay his creditors in the collection of their debts, you will find for plaintiffs.

40 Which instruction was by the court refused; to which plaintiffs at the time duly excepted and prayed their appeal.

"IV. The court instructs you that fraud upon creditors consists of an act or declaration the intent or necessary result of which is to withdraw the property of the debtor from the reach of his creditors."

Which instruction was by the court refused, and the plaintiffs then and there excepted and prayed their appeal.

"V. The court instructs you that fraud can be inferred from acts or declarations calculated to establish fraud, and fraud should be inferred when such acts or declarations are in evidence as would lead a reasonable man to believe that an attempt has been made to withdraw the property of the debtor from the reach of his creditors,

and if *prima facie* such attempt is established the presumption becomes conclusive unless rebutted."

Which instruction was by the court refused; to which plaintiffs then and there duly excepted and prayed their appeal.

Whereupon the court, upon its own motion, instructed the jury as follows:

A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOK.

The issue which you, gentlemen of the jury, have been sworn to try is that of the validity or invalidity of the attachment proceedings in this case. The original grounds as set forth in the plaintiffs' affidavit upon which the writ of attachment herein was issued reads as follows: "That the defendant has sold, conveyed, or otherwise disposed of his property or suffered or permitted it to
41 be sold with the fraudulent intent to cheat, hinder, or delay his creditors;" that affidavit was made and the writ of attachment issued on the 29th day of December, 1889. Since the issuing and the levying of the writ of attachment and since the beginning of the present term of the court the affidavit has been by the consent of the parties amended by adding these words: "And has removed a material part of his property out of the Indian Territory, not leaving enough therein to — the claim of the defendant's creditors;" which was doubtless intended to mean that he, the defendant, had removed a material part of his property out of the Indian Territory, not leaving enough therein to satisfy the claims of the defendant's creditors. To this affidavit the defendant, W. Scott Cook, filed his own affidavit, in which he says: "W. Scott Cook, defendant in above cause, upon his oath denies that he has ever sold, conveyed, or otherwise disposed of his property, or that he has ever suffered or permitted the same to be sold, with the fraudulent intent to cheat or defraud his creditors or to hinder or delay them in the collection of their just debts; and he denies that he is or ever was about to make a fraudulent sale, conveyance, or disposition of his property with such fraudulent intent; and defendant denies that he is or ever was about to remove or has removed his property or a material part thereof out of the Indian Territory, not leaving enough therein to satisfy the plaintiffs' claim or the claims of said defendant's creditors, all as charged in plaintiff-' affidavit for attachment." The charges in the plaintiffs' affidavit for attachment and the denials by the defendant in his affidavit of the truth of each and all of such charges form the issues which you are to try.

The burden of the proof is upon the plaintiffs.

"I. The court instructs the jury that fraud is never pre-
42 sumed, but must be proved, and before the plaintiff- can sustain their attachment upon the grounds first alleged in their affidavit they must prove by a fair preponderance of the evidence that the defendant had, prior to the date on which the attachment issued, sold, conveyed, or otherwise disposed of his property or suf-

fered or permitted it to be sold with the fraudulent intent to cheat, hinder, or delay his creditors."

To which ruling of the court the plaintiffs at the time excepted and prayed their appeal.

"II. Upon the second ground of attachment the court instructs the jury that if they shall believe from the evidence the defendant Cook was insolvent or in failing circumstances, and that he removed a material part of his property—that is, the cattle he shipped to Kansas City, out of the Indian Territory, not leaving enough therein to satisfy the claims of his creditors, you should sustain the attachment, unless you shall also believe from the evidence that the defendant Cook removed and shipped said cattle into the marked at Kansas City, there to be sold and the proceeds of such sale to be applied to the payment of the debts of *bona fide* creditors in good faith and without fraudulent intent; and if you shall also believe from the evidence that said cattle were so sold in Kansas City and that the proceeds of such sale were applied by the defendant to the payment of his debts to *bona fide* creditors in good faith and without fraudulent intent, then you will not sustain the attachment on this ground, even if the defendant was insolvent and in failing circumstances."

To which ruling of the court plaintiffs at the time excepted and prayed their appeal.

III. In regard to the alleged sale by the defendant Cook of a part of his stock of goods to Baer, Seasongood & Co. and Orr & Lindsley Shoe Company the court instructs the jury: The rule of law
43 is that the change of possession must be actual and not merely a constructive change—that is, an open, public, visible change manifested by such outward signs as render it evident that the possession of the owner as such has wholly ceased. If the change is merely constructive, the presumption of fraud arises. If there is a change within a reasonable time after the sale, however, the transfer will be deemed valid; but if a change of possession does not take place within a reasonable time after the sale a change prior to an execution is not sufficient to repel the presumption of fraud.

IV. The presumption is a presumption of a fraudulent intent on the part of the vendor and of participation in it on the part of the vendee.

V. If the jury should find from the evidence that the defendant sold a part of his stock of goods to Baer, Seasongood & Co. and to Orr & Lindsley Shoe Co., and that there was not such a change of the possession as required by law, but that the facts are such as to raise a presumption of fraud, then the question arises and the sole question for you to pass upon and settle is whether or not the presumption of fraud is repelled by the evidence. The question being, "Was the sale honest and *bona fide* and not designed as a mere trick to cover the property?" was the possession retained, if received at all, for a fair and honest purpose? The intention of the parties and the circumstances attending the transaction are to be duly considered by you in deciding the question of fraud or no fraud. You should consider all the facts and circumstances, if there

be such, disclosed by the evidence which to the common understanding and conscience of men either prove on their face
44 or tend to prove good faith.

You will carefully consider all the evidence adduced before you and determine for yourselves the question involved. Was there a sale? Was there a valid consideration? Was there concealment or notoriety attending the transaction? What relation did the parties sustain to each other? What are the facts, if any, indicating a fair intent on the part of the vendor and vendee? The reasonableness as to the value and quantity of the property claimed to have been sold, together with all other facts connected with the transaction, and from all the facts and circumstances connected with the case you will decide of the intent of the defendant. Was it his intent to hinder, delay, or defraud his creditors?

To which ruling of the court the plaintiffs at the time excepted and prayed their appeal.

VI. The court further instructs the jury that if you find for the defendant the measure of his damages will be the fair cash market value of the goods and property at the time of the loss by fire, with six per cent. interest from that date. To which you will add what under the evidence you believe to be a reasonable attorney's fee.

To which ruling of the court plaintiffs there at the time excepted and prayed their appeal.

And the plaintiff- requested the court to submit to the jury the following interrogatories for special findings:

I. Did Scott Cook, after shipping his cattle from the Territory, leave enough property within the Territory to satisfy all of his indebtedness?

II. Did he ship these cattle with the purpose of devoting all of the proceeds to the payment of his debts?

45 III. Was the trade between Scott Cook and John Martin, as agent of Baer, Seasongood & Co. and Orr-Lindsley Shoe Co., made in good faith?

IV. Were the goods mentioned in the bill of sale accepted by the two creditors in unconditional satisfaction of their debts?

V. Or were the goods taken merely as security?

Which request was by the court refused; to which action of the court the plaintiffs at the time excepted and prayed their appeal.

Whereupon the jury retired to consider of their verdict and return into court and announce as follows:

"A. FRANKENTHAL & BRO.
vs.
W. SCOTT COOK.

We, the jury, find the issues in favor of the defendant and assess his damages at $—, with interest, $5,854.63.

Attorneys' fee, 150.00.

W. W. HAYNES, *Foreman.*"

Afterwards, to wit, on the same day, the plaintiffs, by their attorneys, filed the following, to wit:

"FRANKENTHAL & BRO.
vs.
W. SCOTT COOK.

The verdict of the jury in this cause is subject to a credit of seven hundred and five $\frac{92}{100}$ dollars, the amount of the debt sued on in this case and not denied by the defendant and for which plaintiff has judgment."

Whereupon the court entered the following judgment:

"On motion of defendant, by his attorneys, Blair & Lester, for judgment on the verdict in this cause, it is ordered and adjudged that the defendant, W. Scott Cook, have and recover of the plaintiffs, A. Frankenthal & Bro., the sum of five thousand one hundred and forty-eight $\frac{71}{100}$ dollars, and one hundred and fifty dollars, attorneys' fee, together with his costs in this behalf expended."

46 Whereupon the plaintiffs file their motion for a new trial, which is in words and figures as follows:

"In the United States Court for the Indian Territory.

A. FRANKENTHAL & BRO., Plaintiff,
vs.
W. SCOTT COOK, Defendant.

Comes the plaintiffs and moves the court for a new trial herein, and for cause says—

I. The court erred in excluding the testimony of W. T. Hutchings relative to the admissions or statements of David T. Cook regarding the execution of a bill of sale by W. Scott Cook to Baer, Seasongood & Co. and Orr & Lindsley Shoe Co.

II. The court erred in refusing instructions numbered I, II, II, alternative, III, IV, and V asked by plaintiff.

III. The court erred in instructing the jury as follows: "The court instructs the jury that fraud is never presumed, but must be proved, and before the plaintiffs can sustain their attachment upon the grounds first alleged in their affidavit they must prove by a fair preponderance of the evidence that defendant had, prior to the date on which the attachment issued, sold, conveyed, or otherwise disposed of his property or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder, or delay his creditors."

IV. The court erred in giving to the jury the following instructions: "Upon the second ground of attachment the court instructs the jury that if they shall believe from the evidence that the defendant Cook was insolvent or in failing circumstances and that he removed a material part of his property—that is, the cattle he
47 shipped to Kansas City—out of the Indian Territory, not leaving enough therein to satisfy the claims of his creditors, you should sustain the attachment. Unless you shall also believe

[SEAL.] Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

WM. NELSON,
Clerk of the United States Court for the Indian Territory.

Allowed by—
JAMES M. SHACKELFORD,
Judge U. S. Court."

Afterwards, to wit, on the same day, plaintiffs, by their attorneys, filed herein their citation to the said W. Scott Cook; which said citation is in words and figures as follows, to wit:

51 "The United States of America to W. Scott Cook, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the third Monday of July next, pursuant to a writ of error filed in the clerk's office of the United States court for the Indian Territory, wherein Alexander Frankenthal and Albert Frankenthal, partners under the firm of A. Frankenthal & Bro., — plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES M. SHACKELFORD,
Judge U. S. Court."

52 UNITED STATES OF AMERICA, }
Indian Territory, First Judicial Division, } ss:

I, William Nelson, clerk of the United States court in the Indian Territory and for the first judicial division thereof, do hereby certify that the foregoing is a true and correct copy of the record, proceedings, and files in the cause in the United States court in the Indian Territory, numbered 604, wherein A. Frankenthal & Bro. are plaintiffs and W. Scott Cook defendant, as the same appears of record in my office.

In witness whereof I have hereunto set my hand as such clerk and the seal of said court, at Muscogee, Indian Territory, this — day of ——, A. D. 1891.

[Seal United States Court in the Indian Territory, First Division.]

WM. NELSON,
Clerk U. S. Court.

53 The United States of America to W. Scott Cook, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the third Monday of July next, pursuant to a writ of error filed in the clerk's office of the United States court for the Indian Territory, wherein Alexander Frankenthal & Albert Frankenthal, partners under the firm of A. Frankenthal & Bro., — plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal United States Court in the Indian Territory, First Division.]

JAMES M. SHACKELFORD,
Judge U. S. Court.

54 [Endorsed:] Filed Jun- 30, 1891. Wm. Nelson, clerk.

Service accepted this 21st July, 1891.

BLAIR & LESTER,
Def't's Att'ys.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the United States court for the Indian Territory, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States court for the Indian Territory, before you or some of you, between Alexander Frankenthal and Albert Frankenthal, partners under the firm of A Frankenthal & Bro., and W. Scott Cook, a manifest error hath happened, to the great damage of the said A. Frankenthal & Bro., as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the third Monday of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal United States Court in the Indian Territory, First Division.]

WM. NELSON,
Clerk of the United States Court for the Indian Territory.

Allowed by—

JAMES M. SHACKELFORD,
Judge U. S. Court.

56 [Endorsed:] Supreme Court of United States. A. Frankenthal & Bro. *vs.* W. Scott Cooke. Copy deposited for defendant in error in the clerk's office U. S. court for Indian Territory. Filed Jun- 30, 1891. Wm. Nelson, clerk.

[Endorsed:] No. —. In the Supreme Court of the United States. On writ of error from the United States court in the Indian Territory. A. Frankenthal & Bro., plaintiffs in error, against W. Scott Cook, defendant in error.

Endorsed on cover: Case No. 14,828. No. 607. Indian Territory, United States court. Alexander Frankenthal & Albert Frankenthal, partners under the firm of A. Frankenthal & Bro., plaintiffs in error, *vs.* W. Scott Cook. Filed August 29, 1891.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 282.

ALEXANDER FRANKENTHAL ET AL., PLAINTIFFS IN ERROR,

vs.

W. SCOTT COOK.

Extracts from Digest of the Statutes of Arkansas, 1884.

* * * * * *

GROUNDS OF ATTACHMENT.

SECTION 309. The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered (*a*):

(*a*) The code authorizes proceedings by attachment in suits in equity (*American Land Co. vs. Grady*, 33-550.)

First. In an action for the recovery of money (*), where the action is against—

1. A defendant or several defendants who, or some of whom, is a foreign corporation or non-resident of the State (†); or,

2. Who has been absent therefrom four months; or,

3 Has departed from this State with intent to defraud his creditors; or,

4. Has left the county of his residence to avoid the service of a summons (*b*); or,

5. So conceals himself that a summons cannot be served upon him; or,

6. Is about to remove or has removed his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim or the claim of said defendant's creditors (*c*); or,

7. Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder, or delay his creditors (*d*); or,

8. Is about to sell, convey, or otherwise dispose of his

(*) An action for *damages* is an action for money. (See sec. 6346.)

(†) In proceedings by attachment against the property of a non-resident, the statute must be strictly followed. (*Bush vs. Visant*, 40–124.)

(*b*) See note (*d*).

(*c*) If a debtor is removing his property out of the State, not leaving sufficient to pay all his debts, a creditor may attach, although sufficient be left to pay his debts, and testimony of other debts is admissible to prove the insufficiency of the property to pay all. (*Holliday vs. Cohens*, 34–707.)

See *note* (*) to section 361.

(*d.*) A sale or conveyance by a debtor to cheat, hinder, or delay any one creditor, or his removal from the county of his residence to avoid the service of summons by any one creditor, will justify an attachment of his property. (*Sherrill vs. Bench*, 37–560.)

property with such intent. But an attachment shall not be granted on the ground that the defendant or defendants or any of them is a foreign corporation or non-resident of this State for any claim other than a debt or demand arising upon contract.

9. The cause of attachment mentioned in the preceding subdivisions against one or more defendants to a civil action shall not authorize an attachment against any of the defendants who are not embraced in any of said subdivisions, but the estate or interest of such defendants only as are embraced therein shall be subject to attachment.

Second. In an action to recover possession of personal property where it has been ordered to be delivered to the plaintiff, and where the property, or part thereof, has been disposed of, concealed or removed, so that the order for its delivery cannot be executed by the officer. (*Civil Code, sec.* 216.)

* * * * * *

ATTACHMENTS BEFORE DEBT DUE.

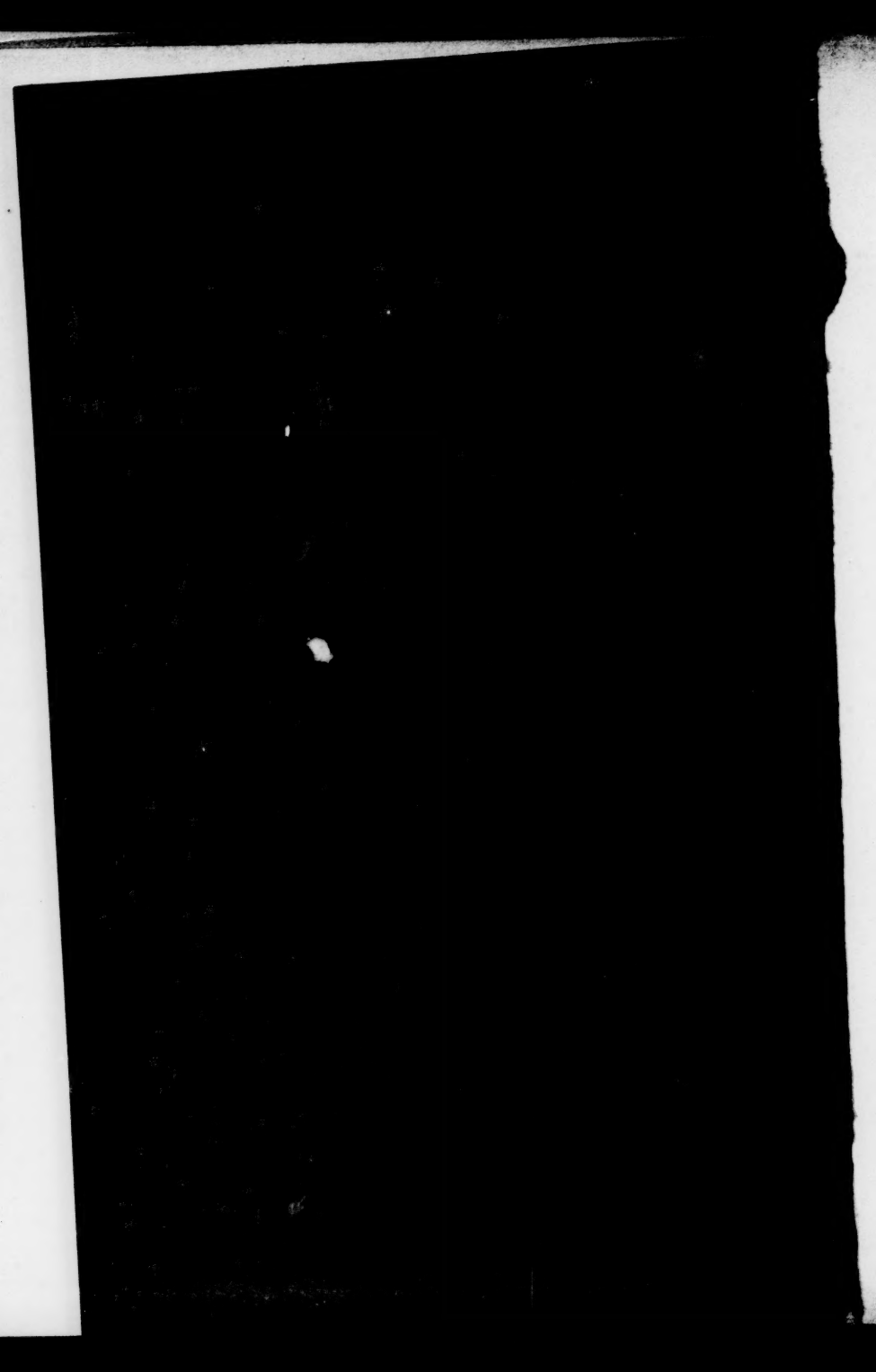
SEC. 361. In an action brought by a creditor against his debtor, the plaintiff may, before his claim is due, have an attachment against the property of the debtor, where—

First. He has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or,

Second. Is about to make such fraudulent sale, conveyance or disposition of his property with such intent; or,

Third. Is about to remove his property, or a material part thereof, out of this State, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts (*). (*Civil Code, secs.* 257–259.)

(*) Shipping cotton by a debtor of this State to a creditor in another State in payment of a debt in good faith and without fraudulent intent will not authorize an attachment, even if the debtor be in failing circumstances. (*Rice, Stix & Co. vs. Pertuis*, 40–157.)



Supreme Court of the United States.

OCTOBER TERM, 1893.

ALEXANDER FRANKENTHAL AND ALBERT FRANKENTHAL, partners under the firm of A. FRANKENTHAL & BRO.,
Plaintiffs in Error,
vs.
W. SCOTT COOK,
Defendant in Error.

No. 607.

In Error to the United States Court for the Indian Territory.

STATEMENT.

This was an action instituted in the United States Court in the Indian Territory by A. Frankenthal & Bro., on the 12th day of December, 1889, for the recovery of $677.00 for goods, wares and merchandise sold and delivered to W. Scott

Cook. $483.50 of said debt was past due and the remaining $193.50 was to become due in a few days.

The action was aided by an attachment, and the grounds alleged for obtaining the writ were as follows, to-wit:

"That the defendant has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold with the fraudulent intent to cheat or defraud his creditors or to hinder or delay them in the collection of their debts; that he is about to make such sale, conveyance, or disposition of his property with such intent; that he is about to remove or has removed his property, or a material part thereof out of the Indian Territory, not leaving enough therein to satisfy plaintiffs' claim or the claims of said defendant's creditors."

The first two grounds alleged are applicable to attachments for debts due and attachments for debts not due, while the last ground is applicable to and supports only an attachment where the debt is due.

The debt was not denied and the issues on the attachment were joined by the defendant's affidavit traversing the several allegations contained in plaintiffs' complaint.

The trial of the attachment was before a jury and developed the following facts:

W. Scott Cook, a resident of Fred, I. T., had been engaged in the general mercantile business there for eight years preceding the issuance of the attachment. During the month of November, 1889, John Martin, a traveling salesman of a wholesale clothing house in St. Louis, Mo., Baer-Seasongood & Co., went to Fred to collect a debt due and owing to his house. Being unable to discharge the indebtedness, Cook told Martin *(see Record, p. 11)* that if he could get his house

and the Orr-Lindsley Shoe Co., to take in payment of their indebtedness goods at invoice price, he thought he could pay all his other debts when he sold his cattle; Martin replied that he would have to consult his house, and accordingly went away to Purcell, some forty-five miles distant, communicated the proposition to his house and returned in about ten days armed with an instrument purporting to be a bill of sale, which was at once executed by invoicing sufficient goods to discharge the combined indebtedness of the two houses, putting them back into the shelves *(see Record, p. 11)* and attaching the invoice to the bill of sale signed by Scott Cook. Attached thereto also was a writing designating as agent to sell these goods, Dave Cook, a brother of Scott Cook, who was then and afterwards in Scott Cook's employment as a salesman in the store. *(See Record, p. 12)*. There was nothing done to indicate a change in the ownership or possession of the property or any of it—no segregation of the part sold from the original stock. *(See Record, pp. 11, 21, 26, 28)*.

Martin represented his house, but by what authority he represented Orr-Lindsley Shoe Co., or who was authorized to act for them, or what was the amount of their debt, or whether or not they accepted the goods and released Cook from the debt, the testimony does not show.

Martin stated that he received no instructions as to the disposition of the goods after the execution of the bill of sale and that Scott Cook could then sell them as well as one Cordell, an employee and salesman of Scott Cook. *(See Record, p. 28)*.

At the time of this transaction the suit of Lewin Bros. instituted the preceding April for the recovery of $873.00 was pending and approaching judgment in the United States Court in the Indian Territory.

At the time of the execution of said bill of sale, Cook,

after getting the advice of Martin, packed up about $600.00 worth of clothing he had purchased of Rindskopf, Stern, Lauer & Co., *(See Record, p. 12)* and notified them that they would *have to take them back*, and that he held them henceforth *subject to their order*. *(See Record, p. 17)*.

A few days prior to the issuance of this attachment Scott Cook shipped to Kansas City, Mo., 188 head of beef cattle, consigned for sale to Quinlan, Montgomery & Co., to whom he was indebted in the sum of $539.66. *(See Record, p. 18)*. The cattle sold for $5,637.65 against which fund he drew orders sufficient to consume it, less the sum of $541.32, which could have, and surely would have, been paid direct to Cook had it not been garnished at once at the suit of creditors.

On the day these cattle were shipped into the State of Missouri Cook had left in the Indian Territory property of the value of a little more than $10,000.00 and this accords to him the highest valuation he put on it himself. This besides includes his dwelling house, valued at $500.00, and stable and fencing, valued at $500.00; none of which were liable to execution, and does not deduct the $500.00 worth of personal property exempt to him as the head of a family. (*See Record, p. 18*).

He owed at the time (most of it past due), according to his own statement, $12,065, *(See Record, p. 20)*, and that does not include the amount he owed one Grant and to whom he gave a draft on Quinlan, Montgomery & Co., the day the stock were shipped, for $3,727.50. Pending the levy of the attachment and trial the storehouse and merchandise were destroyed by fire.

From this state of facts the jury found the issues in favor of Cook, and assessed his damages with interest at $5,854.63 and $150.00 attorneys' fees, which verdict included

the very goods claimed to have been sold to Baer-Seasongood & Co., and Orr-Lindsley Shoe Co.

As the debt sued on was admitted, judgment was entered in the sum of $5,148.71 and from that judgment plaintiffs sued out their writ of error. It is proper to state further that the defendant subsequently filed a remittitur of $2,359.72, value of the goods not claimed by Cook, but the clerk below failed to deduct it in entering up the judgment or embrace it in the transcript, but as its presence or absence can in no way affect the consideration of the questions raised, and as the judgment stands recorded as above, and may in case of affirmance be corrected by the court below before the issuance of an execution, we have made no effort to supply the omission.

SPECIFICATION OF ERRORS.

The Court below erred,

I.

In sustaining the objection of defendant to the following question propounded to witness, W. T. Hutchings, by plaintiffs: "Did you ask him (Dave Cook) whether Scott Cook had assigned, sold or mortgaged all or any portion of his stock of goods?" One of the material issues of the trial was the validity of the sale from Scott Cook to Baer-Seasongood & Co. and others, and it was proposed to show that Dave Cook, the agent of vendees and in possession of the goods still in Scott Cook's store, denied that there had been any sale or transfer. (*See Printed Record, p.* 10).

II.

In refusing to instruct the jury, as requested by plaintiffs, as follows, to-wit:

"The Court instructs you that if you believe from the evidence that defendant shipped or removed a material portion of his property from the Indian Territory, not leaving enough property within the Indian Territory to satisfy all of indebtedness, you will find for the plaintiff and sustain the attachment, and it is not necessary for you to find that defendant shipped said cattle without fraudulent intent or to cheat, hinder or delay his creditors." (*See Printed Record, p.* 29).

III.

In refusing to instruct the jury, as requested by plaintiffs, as follows, to-wit:

"The Court instructs you that under the evidence in this cause there was no sufficient delivery of the goods purporting to have been sold by defendant to Baer-Seasongood & Co., and Orr-Lindsley Shoe Co., and that the sale from defendant to said Baer-Seasongood & Co., and Orr-Lindsley Shoe Co., never became complete, and such attempted sale was a fraud upon defendant's creditors, and you will sustain the attachment in this cause." (*See Printed Record, p.* 29).

IV.

In refusing to instruct the jury, as requested by plaintiffs, as follows, to-wit:

"The Court instructs you that fraud upon creditors consists of an act or declaration, the intent or necessary result of which is to withdraw the property of the debtor from the reach of his creditors." (*See Printed Record, p.* 29).

V.

In refusing to instruct the jury, as requested by plaintiffs, as follows, to-wit:

"The Court instructs you that fraud can be inferred from acts or declarations calculated to establish fraud, and fraud should be inferred when such acts or declarations are in evidence as would lead a reasonable man to believe that an attempt has been made to withdraw the property of the debtor from the reach of his creditors, and if *prima facia* such attempt is established the presumption becomes conclusive unless rebutted." (*See Printed Record, p.* 29).

VI.

In charging the jury as follows, to-wit:

"The Court instructs the jury that fraud is never presumed, but must be proved, and before the plaintiff can sus-

tain their attachment upon the grounds first alleged in their affidavit they must prove by a fair preponderance of the evidence that the defendant had, prior to the date on which the attachment issued, sold, conveyed, or otherwise disposed of his property or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder or delay his creditors." (*See Printed Record, p.* 31).

VII.

In charging the jury as follows, to-wit:

"Upon the second ground of attachment the court instructs the jury that if they believe from the evidence the defendant, Cook, was insolvent or in failing circumstances, and that he removed a material part of his property, that is, the cattle he shipped to Kansas City, out of the Indian Territory, not leaving enough therein to satisfy the claims of his creditors, you should sustain the attachment, unless you shall also believe from the evidence that the defendant, Cook, removed and shipped said cattle into the market at Kansas City, there to be sold and the proceeds of such sale to be applied to the payment of the debts of *bona fide* creditors in good faith and without fraudulent intent; and if you shall also believe from the evidence that said cattle were so sold in Kansas City and that the proceeds of such sale were applied by the defendant to the payment of his debts to *bona fide* creditors in good faith and without fraudulent intent, then you will not sustain the attachment on this ground, even if the defendant was insolvent and in failing circumstances." (*See Printed Record, p.* 31).

VIII.

In charging the jury as follows, to-wit:

"If the jury should find from the evidence that the de-

fendant sold a part of his stock of goods to Baer-Seasongood & Co., and to Orr-Lindsley Shoe Co., and that there was not such a change of possession as required by law, but that the facts are such as to raise a presumption of fraud, then the question arises and the sole question for you to pass upon and settle is whether or not the presumption of fraud is repelled by the evidence. The question being: 'Was the sale honest and *bona fide* and not designed as a mere trick to cover the property?' Was the possession retained, if retained at all, for a fair and honest purpose? The intention of the parties and the circumstances attending the transaction are to be duly considered by you in deciding the question of fraud or no fraud. You should consider all the facts and circumstances, if there be such disclosed by the evidence which to the common understanding and conscience of men either prove on their face or tend to prove good faith.

"You will carefully consider all the evidence adduced before you and determine for yourselves the question involved. Was there a sale? Was there a valid consideration? Was there concealment or notoriety attending the transaction? What relation did the parties sustain to each other? What are the facts, if any, indicating a fair intent on the part of the vendor and vendee? The reasonableness as to the value and quantity of the property claimed to have been sold, together with all other facts connected with the transaction, and from all the facts and circumstances connected with the case you will decide of the intent of the defendant. Was it his intent to hinder, delay, or defraud his creditors?" (*See Printed Record, p.* 31).

IX.

In charging the jury as follows, to-wit:

"The Court further instructs the jury that if you find for the defendant the measure of his damages will be the

fair cash market value of the goods and property at the time of the loss by fire, with six per cent. interest from that date. To which you will add what under the evidence you believe to be a reasonable attorney's fee." (*See Printed Record, p.* 32).

BRIEF OF ARGUMENT.

I.

As to the first assignment of error, the witness should have been allowed to answer the question.

As there was a continuance of possession, so the *res gestae* continued.

Bump on Fraud. Conv., p. 588.

Waite on Fraud. Conv., Sec. 279.

Winchester & Partridge Man'f'g Co. vs. Creary, 116 *U. S.*, 165.

II.

The instruction requested by plaintiffs, (*See Record, p.* 29) and embraced in Specification of Errors No. II, should have been granted without modification.

The language of the section of the attachment law under which the allegation in the complaint was framed, and this request made, is as follows: "Is about to remove, or has removed his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiffs' claim or the claim of said defendant's creditors."

Upon the question of defendant's insolvency we respectfully submit:

That at the time he shipped the cattle his liabilities exceeded $12,000.00.

That after shipping his cattle he had left in the Indian Territory:

One stock of goods, invoice price,	$6,100.00
Accounts collectible	2,500.00
Corn, hogs, etc.,	1,000.00
Total	$9,600.00

The home and store-house were then not subject to execution. But counting the store-house and allowing nothing for exemptions his entire assets were $10,100.00, the store being valued at $500.00. But the face value of the assets is not the standard. At a reasonable estimate a 25 per cent. reduction would still be a high valuation. This leaves his assets about $7,500.00. At nominal values his assets lacked more than $2,000.00 of being as much as his actual liabilities. His assets at actual value would not have paid 50 per cent. of his liabilities. A thing has value as it is marketable or as there is a demand for it. Defendant testifies that his goods were unsaleable—therefore worth less than the cost. The jury in estimating the value of the entire stock of goods and store-house assessed the damages at only $5,854.63 and that included six month's interest. A more liberal discount would have to be applied to his accounts.

Most of his liabilities were past due. One debt had been sued on, and all were old debts with the exception of perhaps $500.00.

If he had been amply solvent he would have paid or secured these pressing debts. The most conclusive evidence of his insolvency to us is the fact that two of his creditors who knew him best, chose to accept, according to Martin's evidence these goods at invoice price, that were unsaleable, and left them in the same store with the same salesman to be disposed of.

No creditor who believed in his debtor's solvency would have taken less than 100 cents.

Martin's act, considering the distance from the market, the expense of this agent and the time of the year, was practically accepting 50 cents on the dollar if the transaction was *bona fide*.

Leaving out all the other testimony and drawing our conclusions on this point solely from the testimony of the defendant, he was wholly insolvent. From that alone we gather that the face value of his property subject to execution, left in the Indian Territory after the shipment of the 188 head of cattle was less by more than $5,000.00, than his liabilities. The cattle shipped was more than a *material* part of his property. The allegation therefore as to removing a material part of his property out of the Territory without leaving enough therein to satisfy the claim of his creditors, was fully proved, and the instruction requested should have been given without qualification.

Marck vs. McDaniel, 4 *Fed. Rep.*, 294.

Holliday vs. Cohen, 34 *Ark.*, 707.

Durr vs. Hervey, 44 *Ark.*, 301.

Such was the construction of the statute, it being subdivision 6 of section 309 of Mansfield's Digest of the laws of Arkansas, by the highest Court of the State of Arkansas, before and at the time it was adopted by Congress and extended over the Indian Territory.

It is fair to presume that such construction was adopted with the statute, especially as it accords with reason and sound public policy.

Appollos vs. Brady, 49 *Fed. Rep.*, 401.

Nicollet Nat. Bank vs. City Bank, 38 *Minn.*, 88.

Peters vs. Bain, 133 *U. S.*, 670.

Since its adoption, however, it has been twice passed on by the Supreme Court of Arkansas, and more strongly, if possible, construed in our favor.

Simon vs. Sevier Ass'n, 54 *Ark.*, 58.

Goodbar vs. Bailey, 57 *Ark.*, 611.

The statutes of some of the States require an allegation, and *a fortiori* proof, of fraudulent intent, but the above is the universal construction in all the States having statutes similar to Arkansas.

Stephenson vs. Sloan, 65 *Miss.*, 407; 4 *So.*, 342.

Wilkerson vs. Dockery, 12 *So. Rep.*, 585.

Haber vs. Nassetts, 12 *Fla.*, 589.

Mingus vs. McLeod, 25 *Iowa*, 452.

Stewart vs. Cole, 46 *Ala.*, 646.

Waples on Attachment, *p.* 55.

The Supreme Court of Tennessee in the well considered case of *Friedlander vs. Pollock*, 5 *Cold.*, 490, says: "It is not necessary in order to sustain the issue of—*has removed or is about to remove*—to show that the debtor has done or is about to do this of any *dishonest* or *fraudulent* or *injurious purpose* toward the attaching creditor or any other creditor. The statute does not make *fraud* or *dishonesty* or *intentional injury* to the attaching creditor or any creditor an element of the issue 'has removed' or 'is about to remove.' The *removal*, or the *being about to remove*, is one element and the

property is another. And *these two* being shown maintain the issue."

And Eakin, J. in *Kuhn vs. Kuhn*, 44 *Ark.*, 408, in pointing out the defect in an affidavit for attachment uniting a debt due and a debt not due, but which failed to state in the third allegation *any ground* for a general attachment says: "To make it so in case of actual or contemplated removal of property, it must be stated that the defendant is not leaving, or about to leave enough property in the state to satisfy the plaintiffs' claim or the claim of defendant's creditors, *but the fraudulent intent need not be alleged.*"

The Court in the instruction given covering this point and set forth in Specification of Errors No. VII endeavored, it appears, to cast aside the weight of precedent and reason and to soar aloft to a higher and unexplored domain of the law; for it is not only not applicable to the facts of this case, but to none that we can conceive of.

The decisions of Arkansas which should have guided the Court admit of no exception to or modification of the rule laid down in the instruction refused; nor does reason or precedent suggest any, however harsh may seem the rule on its face, save possibly the state of case presented in *Lowenstein vs. Bew*, 68 *Miss.*, 265.

This last case has been most ably and clearly distinguished by the same court in the recent case of *Crow vs. Lemon & Gale Co.*, 69 *Miss.*, 799; 11 *So. Rep.*, 110, which is on all fours with the one under consideration. In it Cooper, J., says: "The defendant was being examined by his counsel touching these shipments, when the following questions were asked, and the following answers given thereto: 'Question. What became of the proceeds of the sale of that cotton? Answer. Well, it went to pay my debts to various parties. Q. The parties to whom you shipped—the consignees? A. Yes, sir; to them and to other parties.

I drew on them to pay it.' By this testimony it appears that some portion of the proceeds of the cotton shipped beyond the state was not applied to the debts due the consignees, but was, upon the order of the defendant, applied to the debts of other creditors; or, in other words, was disposed of by the defendant at his will. This was clearly such removal of his property by the defendant without the State as to subject him to attachment at the suit of other creditors. It is supposed by counsel that the case of *Lowenstein vs. Bew*, 68 *Miss.*, 265; 8 *South. Rep.*, 674, is authority for the proposition that one, though insolvent, may send his property beyond the limits of this State without subjecting himself to attachment, if the purpose in so doing be to pay his debt from the proceeds of the sale thereof, and such property is sold, and the proceeds so applied. No such rule was declared in that case. It was there decided that one owing a debt to the consignee greater than the value of the cotton, and who consigned the cotton to such creditor to be sold and the proceeds applied to the debt, was not subject to attachment; and this for the manifest reason that no other creditor could by possibility be thereby injured. But there is a broad difference between what was done by the debtor in that case and this. Bew shipped his cotton to his creditor in payment of the debt he owed him. The sale by the creditor was but for the purpose of reducing the property to money to determine the amount for which the debtor should have a credit on the debt. In this case Crow shipped his cotton to his creditor, not in payment of his debt but to create a fund against which he might draw to pay such other debts that he owed as he might elect to pay, and did in fact so apply a part of the proceeds of the sale. If a debtor may thus remove his property out of the State, controlling and directing its future application, he may, at his will, defeat creditors entirely, or send them beyond the jurisdiction of this State in search of his property, and this is precisely what the law intends to prohibit."

The distinguishing difference in the two cases is largely

in our favor. In that case the debt paid *all* the proceeds of sale to his creditors; in ours, after the payment of all drafts drawn on the fund, defendant had left $541.32 which he was going to pocket and appropriate to suit himself, as shown by the statement of the commission merchants:

"OFFICE OF QUINLAN, MONTGOMERY & CO.,
LIVE STOCK COMMISSION MERCHANTS.

KANSAS CITY, Dec. 20th, 1889.

W. SCOTT COOK, ESQ., Fred, I. T.

DEAR SIR:—We have mailed you a-p'r sales 188 cattle net proceeds $5,637.66.

We paid your note and int.,		$ 539.66
" " "	c'k	$3727.50
" " "	Barton Bros.,	$ 98.65
" " "	Sam'l C. Davis	$ 730.53
		$5096.34

$5,096.34
$ 541.32

This am't, $541.32, garnisheed our hands."

The Arkansas statute *does require* an allegation of fraud in cases of attachment exclusively for debt before due. (*Mansfield's Digest of Stats. Ark., Sec.* 361).

Rice, Stix & Co. vs. Pertuis, 40 *Ark.*, 157.

Pride vs. Wormwood, 27 *Iowa*, 257.

To one not conversant with the attachment statutes of Arkansas extended over the Indian Territory by Section 6 of the Act of March, 1889, contained in *Sup. Rev. St. U. S., p.* 671, the casual reading of the case of Rice vs. Pertuis *supra* would likely be misleading, and would suggest an apparent conflict with the other Arkansas cases.

Even so thorough a lawyer as the author of Drake on

Attachments has fallen into the error and entirely misapprehended the decision.

Drake on Attach., *7th Ed.*, *Sec.* 71.

When, however, the case is read in the light of a knowledge of the Statutes, the apparent conflict at once disappears, for we see that in that case the attachment was for a debt to become due, which requires an allegation and proof of fraud, and all the other cases above mentioned were attachments for debts due, except *Kuhn vs. Kuhn*, which, as shown above, sustains our position.

In *Rice vs. Pertuis* the suit was brought the 15th day of December, 1880, upon a debt no part of which had matured but was to become due the 3rd day of January, 1881.

The distinction is made still plainer by the language of English, C. J., on page 160 of that case: "When the debtor 'is about to remove his property, or a material part thereof, out of the State, with the intent or affect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts,' the statute makes it ground for attachment before the creditor's claim is due."

If, however, that case had been in conflict with *Durr vs. Hervey*, and the other decisions cited above, the latter being subsequent would over-rule and control it.

A part of the debt sued for in this case had matured, and the remainder was to mature in the same month the suit was instituted. The two classes of debt were properly consolidated in one attachment.

The first two grounds of attachment were common to and would support both classes, while the last was applicable only to attachments for matured debts.

Kuhn vs. Kuhn, 44 *Ark.*, 404.

The foregoing was a case in which a debt due and one not due were joined or united in one attachment, and there was an abortive attempt to allege the very three grounds alleged in the complaint in this case.

If our attachment had been sustained on the last allegation which will support only an attachment for a mature debt, the allegations as to the immature debt would simply be treated as surplusage and the attachment held good.

Drake on Attachments, Sec. 33.

III.

We will next consider the validity of the sale of goods to Baer-Seasongood & Co., and Orr-Lindsley Shoe Co.

As Assignments of Error Nos. 3, 4, 5, 6 and 8 touch this phase of the case, and as the instructions refused are not properly covered by those given, we will argue together the several questions arising out of them.

The Court told the jury, "That fraud is never presumed, but must be proven."

While this "trite scrap of judicial phraseology" might work no special injury in some cases, without being followed by the explanation offered in the 5th Assignment of Error or some other adequate one, it was peculiarly misleading in this case, as a rule for determining the question of *fraus vel non.*

Waite on Fraud. Conv., Secs. 234, 236, 241.

Bump on Fraud. Conv., pp. 600-601.

We had already proved a retention of possession of the goods after the sale, which the Court told the jury raised a presumption of fraud, and which therefore they should have been instructed cast the *onus* of *bona fides* on the defendant,

but instead of instructing the jury to that effect, as well as to the legal effect of failure to repel this presumption, they were simply told "to pass upon and settle whether or not the presumption of fraud is repelled by the evidence."

Stix vs. Chayter, 55 *Ark.*, 116.

Shaul vs. Harrington, 54 *Ark.*, 307.

Tiedeman on Sales, Secs. 84 *a and* 106.

Caldwell, J., in commenting on this very language used by the same Court in *Baer vs. Rooks*, 50 *Fed. Rep.*, 901, says: "If a party conceives that the evidence discloses any fact or circumstance which the law regards as a badge of fraud, or *prima facie* evidence of fraud, he may, if the Court omits to notice it in its charge, prefer a request for an instruction to that effect."

This we did and it was refused. Again the Court told the jury that among the several questions to consider in arriving at their conclusion on this question, the vital one was: "Was there a sale?" and yet left them without any rule or suggestions to guide them in determining what the law deems a completed contract of sale.

This was a case where possession and the surrounding circumstances indicated a transaction so contrary to public policy that no further testimony of actual intent was necessary; the possession so conclusively indicated fraud, that it became the province of the Court to instruct the jury, hypothetically, respecting the legal effect of such a possession, if not of its own motion to give a peremptory instruction in favor of the plaintiffs.

To make an otherwise *bona fide* contract of sale complete there must be either an actual or constructive delivery, else the property in the thing sold does not vest in the

vendee, as against attaching creditors. The change of possession, like other parts of the transaction, must be the will of both parties, and with the design of rendering the sale complete.

What does the testimony show as to this? We take the following from W. Scott Cook's testimony: "We then invoiced the goods as set out in the invoice attached to the bill of sale. We put the goods out on the counter as we invoiced them, and then after dusting and cleaning them we put them in the shelves—that is, the clothing and gents' furnishing goods; the shoes were put on a double-decked table that I had in the center of the store made for holding shoes." *(See Record, p. 11).*

"Dave Cook had clerked for me previous to the execution of the bill of sale to Martin for several months, as had also Cordell. These two stayed in the store after the execution of the bill of sale. There was no disposition of the stock mentioned in the bill of sale except it was placed back in the shelves separate from other goods. It was understood that the goods were to be sold in the usual course of trade for cash. Dave Cook and Cordell ran the store while I was out tending the cattle. I don't remember that I sold any of these particular goods. I would have sold any if anybody had the cash to buy. It was so understood by us all. There was nothing in the arrangement of the merchandise to indicate to anyone that part of the stock belonged to one man and part to another. I was about the store as much as usual, and there was nothing about the store to indicate to any one that I had sold any part of the goods. I have not paid Baer-Seasongood & Co., or Orr-Lindsley Shoe Co. any money since the attachment and still owe them the same amount I owed them when I shipped my cattle."

"All of my debts except part of the debt of Frankenthal & Bro., and possibly the debt due Collins Bros., was past due. Much of it was long past due. Lewin Bros., one of

the attaching creditors, had sued me in April, 1889." (*See Record, p. 21.*)

From the testimony of Dave Cook:

"Question. Was there anything in the store or any change made in the goods to indicate that they had been sold to anybody or that they were owned by anybody other than Scott Cook?

Answer. The clothing was separated. I do not know if anybody could have told the difference.

Q. Did you ever tell anybody that that property was the property of Orr-Lindsley Shoe Co. and Baer-Seasongood & Co., and that in selling the same you were acting as their agent?

A. I do not know that I ever did, sir. It was not my business to explain to every one that come in who the goods belonged to.

Q. Were you not frequently questioned as to whether or not Scott Cook had made an assignment, or whether any change had been made in the business; if so, what was your answer?

A. I had several ask me if he had made an assignment, and I told them no, the same as I told you.

Q. Do you know whether or not Mr. Martin receipted to your brother in full for the indebtedness he represented against him?

A. No, sir, I do not." (*See Record, p. 26*).

From the testimony of John Martin:

"The goods as invoiced were put on the counter. Then

we dusted and cleaned them and put them back in the shelves. I left Dave Cook in possession, went to the railroad and sent the bill of sale, etc., to my house with a full report of all that I had done for their approval. I have entered a credit on my little pocket memorandum book to Scott Cook for $1868.24.

"I received no instructions from my house as to the disposition of the goods after the bill of sale was executed. * * * * * When the goods were back in the shelves it was understood that Dave Cook should remain in possession and should sell them for cash. Scott Cook and Cordell could sell them also. Both Dave Cook and Cordell had previously clerked for Scott Cook. There was no change in the store. Any person coming into the store could have seen nothing to call his attention to the fact that part of the goods were Scott Cook's and part mine. No sign was put out and nothing about the store was changed in the least. Cook told me that the goods were unsuited to his trade. He could not pay my debt, and I thought I would accommodate him. I do not settle with solvent men in this manner. I frequently take back goods from good customers when they do not suit."

Question. Why, if these goods were unsuited to that market, did you leave them there to be sold on the same market?

Answer. I made the trade and reported to the house and left it for them to give further directions." (*See Record, p.* 28).

Constructive delivery in this case should have been such a change in the character of possession as to appraise those accustomed to deal with the vendor of its nature and character—a special identification and setting apart of the goods sold.

Davis vs. Meyer, 47 *Ark.*, 210.

Valley Dist. Co. vs. Atkins, 50 *Ark.*, 289.

Moss vs. Sanger, 75 *Tex.*, 321; 12 *S. W.* 616.

Bailey vs. Ogden, 3 *Johnson* 399; *Am. Dec.*, 509.

Renninger vs. Spats, 12 *Pa. St.*, 524; 15 *Amer. St. Rep., (note)* 694.

Was the sale otherwise *bona fide*? The evidence fails to show Martin's authority to act for Orr-Lindsley Shoe Co., either in the acceptance of the goods or the discharge of the indebtedness, nor is there any evidence tending to show that either of the parties ever accepted the goods in full payment of the indebtedness, and cancelled the same on their books of account. This evidence was wholly and solely within their and defendant's knowledge and the burden was cast on the defendant to prove it. On the contrary when asked at the trial six months afterwards for a list of his indebtedness Cook includes the debt mentioned in the bill of sale as a part of his out-standing indebtedness, (*see Record, p.* 20); and on cross-examination stated that he still owed them the same amount he owed them when he shipped his cattle, having stated that that he owed them at that time $1850.

These two houses had no business nor other connections and yet the evidence fails to disclose the amount of the separate indebtedness of each.

IV.

The last instruction given by the Court being Specification of Error No. IX, was erroneous in two respects:

(1) Interest is purely a creature of statute, and without some statutory provision none can be recovered in a common law suit. There was no law authorizing its recovery in the Indian Territory at the time this suit was instituted and tried.

Thompson vs. Rainwater, 49 *Fed. Rep.*, 406.

City of Pekin vs. Reynolds, 31 *Ill.*, 529; *Am. Dec.*, 244.

Houghton vs. Page, 2 *N. H.* 42; 9 *Am. Dec.*, 30.

Reece vs. Knott, 3 *Utah*, 451.

(2) The damages recoverable against a plaintiff and his bondsmen in an attachment suit under the laws in force in the Indian Territory are only such as are denominated in the bond—a proper construction of the law does not admit of an allowance of attorneys' fees as a part of such damages.

Patton vs. Garrett, 37 *Ark.*, 605.

Jacobus vs. Monongahela Nat. Bank, 35 *Fed. Rep.* 395.

Respectfully submitted,

W. T. HUTCHINGS,

Attorney for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 282

ALEXANDER FRANKENTHAL AND ALBERT FRANKENTHAL, PARTNERS UNDER THE FIRM OF A. FRANKENTHAL & BRO., PLAINTIFFS IN ERROR,

vs.

W. SCOTT COOK.

IN ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The statement of plaintiff in error is defective in this:

There was a segregation of the goods conveyed by bill of sale set out in transcript. They were taken from their former places, and put in shelves on a large double-decked table in the middle of the store, separated from other goods. (Pp. 11, 21 and 26 Transc.)

Again, Martin, though he does not say when or in what manner he got his authority to act for the Orr Lindsay Shoe Co., yet after communicating with his own house in St. Louis, returned to Fred and assumed to act for both; took the bill of sale in both names; and credited Cook with the total amount. Plaintiff did not ask for his authority on cross-examination, and it can not be presumed that he acted without such authority.

Again, plaintiff assumes that Cook was the head of a family, though there is no evidence on that point.

It will be observed, too, that the bill of sale is dated Nov. 30th, the attachment sworn to on Dec. 12, 1889, and the levy made

Dec. 16th; the latter interval being about the time necessary to get from Muskogee to Fred.

Plaintiff's statement of liabilities and assets will be noticed in the argument.

Brief and Argument.

I.

In reply to the argument of plaintiff in error on the statutory provision giving right of attachment for removal of property out of the Territory, it is conceded that the Arkansas cases go to the extreme length contended for; but it is earnestly submitted that such construction ought not to be followed by this court.

When a statute is adopted by one of the States of our Union from a sister State, the general rule is that the construction placed on such statute by the courts of the parent State, will be followed by the adoptive State.

Endlich on Statutes, § 371.

But such construction, while entitled to respect, is not binding.

Ingraham v. *Regan*, 23 Miss. 213. And the imported construction must be in harmony with the spirit and policy of the laws of the latter.

Rigg v. *Wilton*, 13 Ills. 15.
Streeter v. *People*, 69 Id. 598.

If the language is fairly susceptible of another construction, the act will not be permitted to conflict with other laws or with the policy of the adoptive State.

Cole v. *People*, 84 Ill. 216.

The statute in question is fairly susceptible of two constructions:

1. The one contended for by plaintiffs; and

2. That it is not applicable to cases where the defendant ships his goods out of the Territory for the honest purpose of paying existing *bona fide* debts. *A fortiori* should it not apply when such shipment is to the only available market for such goods?

The latter construction is more in consonance with the spirit and intent which it is reasonable to presume must have actuated the Congress of the United States in legislating for the Indian Territory. The obvious intent of the legislature of Arkansas in enacting the law in question was to discriminate in favor of citizens of that State and against citizens of other States. The functions of Congress are co-extensive with the Union, and not limited by State lines. Is it to be presumed, then, that Congress intended to discriminate in favor of or against any class of our citizens? The proposed construc-

tion is not in conflict with the decision of Judge Caldwell in *Mack & Co.* v. *McDaniel*, 2 McCrary, 198, cited by plaintiff, but rather in harmony with the robust reasoning in the opinion of that learned jurist.

And again, it is a fact of which this court will probably take judicial notice, that the cattle markets were, in 1889, when this attachment was laid, and still are, located in certain centers, among which is Kansas City. It appears *passim* in the transcript that defendant lived at a place where there were no houses other than his own, nor any stores nearer than fifteen miles; in fact, he was some forty-five miles from the railroad. The court will readily understand that he not only had no near-by market for a herd of nearly 200 beef cattle, but there was practically no such market in the Territory. If plaintiff's contention be right, then it was the duty of defendant to keep his cattle, eating off their heads, until such time as his creditors obtained judgments and levied executions thereon; notwithstanding the fact that except for the extraordinary dullness of the market, by shipping them he could have reduced his debts by nearly $3,800. (P. 18, Transcript.)

With some diffidence, because the point does not seem to have been raised in any of the States having this or a similar statute, probably because the amounts involved have been uniformly small, I suggest that the statute in question, as the legislative enactment of a State of this Union, is void, for that it is an interference with interstate commerce.

Be it observed that the statute applies to the property of any one who "is *about* to remove or has removed" a material portion thereof, from the State. If the Arkansas construction be valid, then the very property which the debtor is "about to remove" may be attached. In fact, in one of the late Arkansas cases, this was actually done. If Scott Cook owed a valid, subsisting, past-due debt to a citizen of Missouri, and for the purpose of paying that debt, he was about to ship his cattle there, is it not an interference with interstate commerce to seize such cattle in behalf of another creditor? I have been able to find no adjudication exactly in point; nor does the question seem to have been raised; but I can not perceive why the result indicated does not follow.

If the statute was void when enacted by the legislature of Arkansas, it was not adopted by the act of Congress of 1889.

And yet again, the statute, literally construed, is admitted, impliedly, by the Supreme Court of Arkansas, to be harsh and oppressive.

Goodbar v. *Bailey*, 57 Ark. 611, 615.

Finally, attachment statutes are devised for the prevention, not the perpetration, of fraud. It surely ought not to be deemed an unwarranted exercise of authority for the courts to write the word "fraud" in the statute in question; making it applicable only to cases in which the insolvent is endeavoring to secure some improper

and hence fraudulent, advantage to himself. That the Supreme Court of Arkansas has declined so to construe the act, is no reason why this court should refuse. The Arkansas court was, perhaps, effectuating the spirit of the Arkansas legislature, as well as the letter of the act, but that discriminating intent being absent from the congressional mind, such construction, while within the letter, is contrary to the spirit; and, "*cessante ratione legis, cessat ipsa lex.*

For all these reasons, the construction placed on this section of the attachment law by the Supreme Court of Arkansas, seems to me to be one that this court should not follow.

II.

But assume for the purpose of argument, that the statute in question is valid and was in force as construed by the Supreme Court of Arkansas over the Indian Territory. Have the plaintiffs in error made out a case under it?

The table of assets and liabilities set out in plaintiffs' brief would seem to maintain their proposition, but it is submitted that the same is unfair, if not disingenuous.

The assets are scheduled as:

Stock of goods, invoice price	$6,139 00
Accounts collectible	2,500 00
Corn, hogs, &c	1,000 00
Total	9,639 00

From the testimony, I find the following additional items:

Stable and fencing. (p. 18, Tr.)	$ 500 00
Store-house (p. 18 Tr.)	400 00
A total of	$10,539 00
To which it is necessary to add	$ 1,910 00

which were realized from the cattle over and above the Grant money, and which must be added to the assets or deducted from the liabilities, making a total of assets of...$12,449 00

Of this last item no mention is made by plaintiffs in error.

The liabilities were $12,965.

The record does not show that Cook was the head of a family, and entitled to a homestead, or $500 exemption, even if at that time there was any homestead and exemption law in the Territory. Nor is any account taken in the schedule of assets of the value of the store-fixtures, nor is anything added to the invoice price of the goods in stock for freight (the latter no small item when forty-five miles of teaming across country is considered), nor for reasonable profit on retail price, nor for good will of business.

There is no rule in law or in reason for a deduction of twenty-five per cent on these goods in estimating their value under the attachment statute, as contended by plaintiffs. That statute is *in invitum*, and the plaintiff must bring himself within its terms strictly construed. There seems to be no authority in point, but principle would indicate that the construction favorable to defendant should prevail.

It will be observed that it is not true, as stated in plaintiff's brief, that defendant testified that "his goods were unsalable." (P. 12, Brief P. in E.) What defendant did say was: "Many of the goods I had were unsalable." (P. 11 Tr.), and that the R. S. L. & Co. goods were too high-priced to suit his trade. (P. 12 Tr.)

Thus it appears that making no allowance for the abnormal depression of the cattle market, whereby defendant realized nearly $2,000 less than he ordinarily would from his cattle, and taking no account of store fixtures, of freight on goods, or of retail profits, or of good will of business, we have an excess of liabilities over assets of only about $500 in a total of each of over $12,000, or about four per cent excess of liabilities. Is the attachment statute meant to apply to such a case?

III.

The contention of the plaintiffs in error that the transfer of the goods to Martin came within the purview of the statute authorizing an attachment for the fraudulent disposition of the debtor's property proceeds, I submit, upon an erroneous view of the scope of such enactment.

It is elementary knowledge that a failing debtor may, at common law, prefer any creditor. Such, too, is the law of Arkansas.

Cox v. *Fraley*, 26 Ark. 20.

The logical result of such a doctrine is that a conveyance by such a debtor of his property, in preference, to pay a *bona fide* debt, is not obnoxious to attachment statutes against fraudulent conveyances.

The cases are entirely in line with this deduction. Among the cloud of authorities enunciating this principle, I select the following:

A debtor may lawfully sell his entire stock in payment of a *bona fide* debt.

Chouteau v. *Sherman*, 11 Mo. 385.
Fitzpatrick v. *Flannagan*, 106 U. S. 650.

A confession of judgment to prefer a *bona fide* creditor will not sustain an attachment.

Estes v. *Fry*, 22 Mo. App. 80.

A chattel mortgage to secure *bona fide* debts will not warrant attachment.

Miller v. *Wichita, etc.* (Kas.), 35 P. 799.
Gregory Grocer Co. v. *Young* (Kas.), 36 P. 713.
Iosco Co., etc., v. *Barnes* (Mich.), 58 N. W. 606.
Pierce v. *Johnson*, 93 Mich. 125.
Palmer v. *Hawes*, 80 Wis. 474.

The evidence shows that the transfer of the goods to Baer, Seasongood & Co. and the Orr-Lindsay Shoe Co. was in good faith to pay a pre-existing debt. A bill of sale, in proper form, was duly executed (p. 12 Transcript) and credit given by Martin (p. 28 Trans.) for $1,868.24. It can hardly be seriously contended that Martin was not the agent of the grantees. Both Scott and Dave Cook recognized him as such. (pp. 11, 21, 22.) The necessary implication from the testimony of Martin preserved in the record is to the same effect. No question was asked Martin on cross-examination touching his agency. The point is raised for the first time in this court. Scott Cook's testimony (p. 21 Trans.) that he still owed these creditors the same amount at the time of the trial as at the date of the shipment of cattle, was strictly true; for the transfer of goods was in November and the cattle were shipped in December. It is manifest, however, from his entire testimony, that Cook regarded the transfer as a payment, and any apparently inconsistent statements were mere inadvertencies.

IV.

But the plaintiffs strenously insist that, even if the foregoing be true, the sale was void for want of sufficient delivery of the goods.

It must be borne in mind that the only buildings at Fred were the store, residence and barn of defendant, which were forty-five miles from Purcell, and fifteen miles from the nearest store. (P. 11 Trans.) It is not contradicted that defendant, after executing the bill of sale, separated the goods invoiced, and placed them on a large table in the middle of his store (pp. 11, 21 and 26 Tr). Dave Cook was put in charge of them under a written contract (pp. 23, 11, 12, 28 Tr.) and Martin reported the sale to his principal (p. 28 Tr). Twelve days later the attachment was sued out.

The law is well settled that the delivery in cases of supposed fraudulent transfers need be only such as the nature of the property and the circumstances of the sale will reasonably permit.

Manton v. *Moore*, 7 T. R. 67.
Walden v. *Murdock*, 23 Cal. 540.
McKibben v. *Martin*, 64 Pa. St. 352.

In *Clute* v. *Fish*, 25 Barb. 428, it was held that, where a sleigh was sold in July, and by agreement, owing to the difficulty of moving it during the summer, was stored in the vendor's barn, such

retention of possession did not render the sale void as against creditors.

The cases cited by plaintiffs to sustain this branch of their argument, instead of making in their favor, have just the opposite tendency.

Stix v. *Chaytor*, 55 Ark. 116, was a case of the transfer of goods by an insolvent to his uncle, and no consideration whatever was shown.

The case of *Davis et al.* v. *Meyer & Co.*, 47 Ark. 210, was a case in which one T. being indebted to Meyer & Co., sold certain goods out of his store in payment of such debt. Part of these goods were packed in a box, but not nailed up, and were placed under the counter. The remainder were not separated from the stock in trade. Under the agreement of sale, T. was to send the goods to a certain warehouse in the town. Before this was done, however, T. executed a mortgage upon his entire stock to other creditors and put them in immediate possession. The latter had no knowledge of the previous sale, until after they took possession; whereupon they refused to recognize such sale, and proceeded to sell all the goods under their mortgage.

Meyer & Co. brought trover, and the Supreme Court held that, because of the failure of T. to convey the property to the warehouse there was no completed delivery and that Davis got the better title.

In the subsequent case of *Shaul* v. *Harrington*, 54 Ark. 305, the Davis v. Meyer case was commented on and distinguished, and in the course of their opinion, the court say (p. 308): "Again when "by the contract of sale, the vendor is required not merely to pre- "pare the goods for removal by the vendee, but to make delivery "by deposit at a designated place before the sale is complete, or "when delivery is necessary to take the case out of the statute of "frauds, the failure to make actual delivery prevents the passing "of the title and leaves the property subject to be seized for pay- "ment of the vendor's debts. The case of *Davis et al.* v. *Meyer & "Co.*, 47 Ark. 210 seems to embrace both of the latter features, "consequently it was correct to hold the actual delivery to the first "vendee was essential to give him title against a subsequent pur- "chaser from the vendor in possession. But to hold that actual "and visible possession by the vendee is essential to his title in "every case where the articles sold are capable of manual delivery, "would be in effect to make the continuance of the possession by "the vendor fraud *per se*, and so allow no exculpatory explanation "by the vendee." Further on the court says: "An examination "of the cases will show that a legal delivery and not a visible "change of possession, is all that is demanded to protect the vend- "ee's title."

The case of the *Valley Distilling Company* v. *Atkins*, 50 Ark. 289, cited by plaintiffs in error, is not in point. In that case the owner of a saloon, hopelessly insolvent, executed a bill of sale to his

brother, who was also his employe in the saloon. There was no indication of change of possession and the business was conducted by the vendor as formerly. Some weeks after the bill of sale, attachments were levied by the Valley Distilling Company against the vendor and the vendee interpleaded. The interpleader was the first public announcement of the sale of the property in question. No consideration was proved to have passed from vendee to vendor save the recitation in the bill of sale, that the sale was made in consideration of the surrender of a certain note of vendor's by the vendee to the vendor; but the court say that this is no proof of consideration as against attaching creditors. Such proof must be *aliunde* the bill of sale, and as no such proof was offered, the transfer was held voluntary and void as against creditors. In the opinion of the court it is plainly intimated, though not decided in so many words, that had the consideration been *bona fide* and reasonable, notwithstanding there was no apparent change of possession, the sale would have been held good.

Say the court at page 293: "It was only on proof of a good consideration that there could be room for the jury to find that the "interpleader had overcome the *prima facie* case of fraud made by "his admission at the trial of the insolvency of the vendor at the "time of the sale, and the continuance of his possession thereafter." And again at page 291: "The courts are at variance with each "other, and sometimes with themselves, as to how far the vendee "must go in such a case, in his explanation of the transaction and "possession, to exonerate himself. But that the burden of proof is "shifted to him to show, at least the *bona fides* of the sale, is well "settled; and to establish *bona fides* a sufficient consideration for the "purchase must be shown. In this case the proof of the consideration fell short of the mark, and there was no other effort made "to show good faith."

The case of *Moss* v. *Sanger*, 75 Texas 321, cited by plaintiffs in error, seems to have no bearing whatever upon this case. The only point decided being that, under certain circumstances, intemperate language by counsel to the jury, is reversible error.

The citations from Waite and Bump, as well as from Tiedeman's work, are not especially *a propos*, other than in connection with the general proposition that while fraud is never presumed, it may properly and often must be, inferred by the jury, upon proof of all circumstances surrounding the sale in question; and in the support of the further proposition elementary in its nature, that fraud assumes many phases, is usually secret, and attempted by the perpetrators to be hidden under the cloak of apparent frankness, and sometimes under the cloud of entire secrecy. All these propositions go without saying; having their application usually to cases of voluntary transfers, or to transfers for a consideration, but to the detriment of creditors, that is, where the failing debtor pockets the consideration.

Shaul v. *Harrington*, 54 Ark. 305, cited by plaintiffs, is, it is sub-

mitted, conclusive against them. In that case it is emphatically stated that retention of possession by the insolvent vendor is not fraud *per se*, but only evidence thereof, which may be rebutted. Say the court, by Cockrill, C. J., at p. 307, "This court has persistently held that continuance of possession by the vendor is in effect "only a circumstance indicating fraud." And on p. 310: "Constructive delivery being enough to satisfy the law, it is an easy "transition to constitute the vendor a bailee for the vendee, and so "work out a delivery. And it is held that such a delivery is sufficient against creditors. Whenever there is a completed contract "of sale and an agreement by the vendor to hold as bailee for the "vendee in lieu of actual delivery, the sale is complete against creditors, if it is not otherwise fraudulent."

The case seems to be exactly in point, on this proposition, with the one at bar. Shaul sold some mules to Campbell, who took possession, paying nothing on account. Afterward C. brought the mules to S., stating that he was unable to pay for them, and offered to return them and rescind the contract. To this S. assented, and the mules being still in the actual custody of C., credited C. back with the purchase price. Thereupon C. offered to hire the mules for a definite time, and S. assented. They were attached in C.'s possession. *Held*, a good constructive delivery.

See also the well reasoned case of

Forrester v. *Moore*, 77 Mo. 651.

Under the foregoing authorities the delivery in this case was complete in law.

V.

If the transfer of the goods at Martin's instance was in good faith for the payment of a valid subsisting debt, then it follows that the question of delivery is wholly immaterial. The statute authorizes an attachment when the disposal or conveyance is "with the fraudulent intent to cheat or defraud his creditors, or to hinder or "delay them in the collection of their debts." But if the sale in this case was lawful, and the mere fact of a preference to some creditors did not render it fraudulent and did not have the effect of cheating or defrauding other creditors, and did not have the legal effect of hindering or delaying them in the collection of their debts, so as to come within the provisions of the attachment statute, then the failure to fully complete such transfer by an effectual delivery, certainly can not add any of such elements. Had the articles remained undelivered, and had the defendant obtained further credit upon the express or tacit representation that he still owned them, then a different question would be presented.

It is difficult to grasp the logic of the position contended for by plaintiffs. The cases all hold, that though a failing debtor has definitely determined to transfer, in the near future, a part or all

of his goods, in good faith, to pay an existing debt, attachment will not lie. And if he effectuates that intention, and actually delivers the goods pursuant thereto, and the property is taken forever out of the reach of creditors, still there is no ground for a levy. But, say the plaintiffs, if the goods are not taken away, are not delivered, the non-delivery alone, in some occult way, relates back and makes the whole transaction fraudulent in law, though not so in fact.

The cases, generally, hold that in attachment statutes, the fraudulent sale and the intent to hinder or delay must both be proved; though slight circumstances may justify an inference as to the latter. In the proposition, now under discussion, though the attempted transfer be entirely honest, yet the non-delivery relates back and stamps it as fraudulent in law; thus sustaining the first element. We now have a fraudulent transfer, and again, we invoke the non-delivery to establish the intent to hinder or delay. The reasoning smacks of the " metaphysick " of Hudibras.

A somewhat careful examination of, I believe, all the authorities, fails to disclose a precedent precisely in point, though one or two squint that way.

In the case of *Fitzpatrick* v. *Flanagan*, 106 U. S. 650, so far as the question of delivery is concerned, it appears that on December 19, 1878. Fitzpatrick, the surviving partner of Fitzpatrick Brothers, sold his entire stock of goods to Edward McGinty at cost, with ten per cent added, all of which money was used or pledged to pay *bona fide* liabilities. Immediately after the sale, Fitzpatrick was employed by McGinty as a clerk, to carry on the business at a salary, and shortly afterward a partnership was formed between the two and advertised. The property was attached by other creditors. It does not appear from the report, whether the attaching creditors had notice of the advertisment, or whether there were any other *indicia* of transfer of assets to McGinty, and yet this court set aside the verdict of the jury sustaining the attachment.

It would appear from the report of *Ladew* v. *Hudson River Co.*, 61 Hun 333, that no delivery was made of the property sold by the defendant to raise money to pay its debts, yet the sale was maintained, and the attachment under the statute against disposition of property with intent to defraud creditors was dissolved.

In the case of *Iosco Bank* v. *Barnes*, 58 N. W., 606 (Michigan), the defendant had in his possession some seven thousand dollars, being a portion of $50,000, raised by him on mortgages for the purpose of paying his creditors *pro rata*. An attachment was run on his property, and though he admitted having the above sum under his control and though he refused to disclose its whereabouts, insisting that he intended to use it to pay a certain per centage of all his debts, yet the Supreme Court of Michigan declined to sustain the attachment. This last case is by a most respectable court, and if it be sound, then mere non-delivery in a transaction, otherwise honest, is not sufficient to warrant an attachment.

VI.

I have discussed the two main propositions involved in this case upon the hypothesis, that all the plaintiffs instructions asked and refused were unexceptionable, and that all instructions given were erroneous, thus leaving it to this court to say, upon all the evidence embodied in the bill of exceptions, whether or not any substantial wrong was done plaintiffs by the verdict of the jury. In other words, conceding the jury to have been wrongly charged as to the law, yet was not their verdict substantially just on the facts? If so, then this court will not overturn their verdict.

But in truth, when the instructions given by the court are considered it will be seen that with one exception, the one relating to the shipment of goods out of the territory, they fairly express the law; and they omit no material principle of law applicable to the facts.

The instruction noted in plaintiffs' sixth specification of error and given by the court is clearly unexceptionable. It merely announces that fraud is not to be presumed, and places the burden of proof on plaintiffs below.

In the eighth Spec. of Error, we find a fair statement that retention of possession raises a presumption of fraud which must be repelled by the evidence. The jury are then told to regard all the circumstances; whether the sale was a mere trick, or possession retained for an honest purpose, or the facts such as tend to prove good faith to the common understanding. Whether there was a valid consideration; whether the sale was secret; was there a fair intent on the part of the vendor and vendee?

What more would plaintiffs have? Certainly no instruction by them offered, came anywhere near being so accurate a statement of the law of the case. In addition to the authorities already cited in this brief on the general principles of law applicable to this branch, I cite on this instruction:

Forrester v. *Moore*, 77 Mo. 651, 660.

If this last instruction fairly presents the law, then of course the verdict of the jury is conclusive as to the sale by Cook to B. S. & Co. and The O.-L. S. Co.

As to the instruction given by the court and embodied in the 7th Spec. of Error, I have already conceded it to be contrary to the law as announced by the Supreme Court of Arkansas; but if the showing hereinabove made of assets and liabilities be fair and reasonable, then the instruction did plaintiffs no harm.

I have already discussed the reasonableness of the Arkansas rule.

It was probably incorrect for the court to give the instruction complained of in plaintiff's 9th Spec. of Error, so far as interest and attorney's fees are concerned.

The interest from loss of goods to date of judgment was about $146, which with attorney's fees makes $296. If this court finds the